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Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1263

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS (AFL-CIO), ET AL., *Petitioners,*

v.

UNITED AIRCRAFT CORPORATION, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CONNECTICUT

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UNITED AIRCRAFT CORPORATION, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CONNECTICUT

International Association of Machinists and Aerospace Workers (AFL-CIO), its District Lodge No. 91, and its Local Lodges Nos. 743 and 1746, pray that a writ of certiorari issue to review final judgments of the Supreme Court of Connecticut affirming awards of compensatory damages against petitioners in favor of re-

spondent totalling $1,424,001, plus interest from September 4, 1973 (A. 107a-109a).*

OPINIONS BELOW

The opinions of the Superior Court (Judge Gaffney) are not reported. They are printed in the separate Appendix ("A.") at pp. 1-27a (pre-trial memoranda), 29-55a (decision on liability) and 56-64a (decision on damages). The first decision of the Supreme Court of Connecticut, 161 Conn. 79, 285 A.2d 330, cert. denied on a question preserved but not presented herein, 404 U.S. 1016, is printed at A. 65-89a, amended at A. 91a.

The opinion of the Referee on remand from the Supreme Court of Connecticut is not reported. It is printed at A. 94a-106a. The second opinion of the Supreme Court of Connecticut, 90 LRRM 2249, is not yet officially reported. It is printed at A. 110-125a. The decision of that court denying reargument is printed at A. 125a.

JURISDICTION

The final opinion of the Supreme Court of Connecticut was entered on September 2, 1975. A timely motion for reargument was denied on October 7, 1975. (A.

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* "A." refers to the separately bound appendix to this petition containing the opinions and judgments below.

Under Connecticut practice, the record below is divided into two parts, one referred to as the "Record," containing pleadings, rulings on exceptions, findings, draft (rejected) findings, etc., and the other denominated "Appendix", containing narrative summaries of the testimony of plaintiffs[1] and defendants' witnesses ("A-P."; "A-D."). Because there were two trials and two appeals below, there are two records and several appendices. Occasional references to these documents will be designated "IR," "IIR", "IA", "IIA". The symbols "F" and "DF" refer to "finding" and "draft finding" respectively.

125a). By orders dated December 30, 1975, and January 29, 1976, Mr. Justice Marshall extended the time for filing this petition to March 5, 1976 (A. 126a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).[1]

QUESTIONS PRESENTED

1. In a federally protected strike accompanied by violence, may a court award damages to the employer for losses resulting from employee absence, where the court differentiates the amount of absence caused by tortious conduct from the amount caused by federally protected conduct only by accepting as "expert testimony" the speculative estimate of an employer official and

(a) that witness does not suggest, and the court does not find, any rational nexus between the witness' factual assumptions and his opinion;

(b) the witness' method is unknown to and unaccepted in any scientific discipline;

(c) the opinion is contradicted by the court's own findings and objective facts of record?

2. Does a judgment so grounded deny the defendants property without due process of law?

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[1] The Court below recognized that "defendants extensively and vigorously attack[ed] the [trial court's] findings and conclusions" regarding the percentage of employees absent due to defendants' tortious acts (A. 116a), which the court had held in its first opinion (A. 81a-82a) raised a federal question, as defendants had argued (Brief for defendants on the first appeal, p. 59). Petitioners' claim that entry of judgment on the basis of Mooney's estimates was also a denial of due process in violation of the Fourteenth Amendment was expressly raised at p. 40 of defendants' brief on the second appeal; see also defendants' brief on the first appeal asserting this claim with respect to acceptance of Northrup's opinion at the first damage trial, p. 88.

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

This case involves the Supremacy Clause of Article VI and the Due Process Clause of the Fourteenth Amendment of the United States Constitution and §§ 7 and 13 of the National Labor Relations Act, as amended, 49 Stat. 449, *et seq.*, 29 U.S.C. §§ 141 *et seq.* These provisions are reprinted at p. 1b, *infra*.

I. STATEMENT OF THE CASE

Introduction

This case involves an award of compensatory damages for losses assertedly suffered by respondent employer as the result of violence in the course of petitioner Unions' strike for new collective bargaining agreements. Recovery was awarded on the theory that the violence caused involuntary absenteeism which in turn caused economic injury to the Company in the form of wasted overhead, spoiled work, excess overtime and otherwise.[2] Since, under federal law, an employer may not recover for strike absence which was *not* tortiously caused (see pp. 32-33 *infra*), the central issue litigated below was the *amount* of absence which was caused by the violence.

The courts below decided that question solely on the basis of the *opinion* of one witness (a retired high official of respondent) who *estimated* how many employees were absent involuntary each day of the strike. It is our contention that description of the witness' avowed method of arriving at his estimates, and of record facts

[2] The formula for converting involuntary absences into dollars lost, and the application of that formula, were the subject of considerable controversy below (A. 113a-116a); however, we do not here challenge the State Court's resolution of these matters.

which bear on their reliability and indeed their rationality, establishes that the witness was engaged in sheer speculation; that his estimates are gross exaggerations; and that a judgment based thereon penalizes lawful strike conduct under the guise of compensating for involuntary absence. Indeed, we shall show that the amount of involuntary absence found below on the basis of this witness' opinion was far in excess of that which would be derived by a projection of the testimony of those absentees whom the Company put on the stand —a handpicked sample strongly biased in plaintiff's favor. We also submit that even if rights protected by federal statute were not involved, the judgment could not constitutionally stand because the sole testimony relied on is so far from being rationally probative that it cannot serve as "evidence" adequate, as a matter of due process of law, to support any judicial judgment.

A. The Strike

Respondent (hereinafter sometimes referred to as "plaintiff" or "the Company") is engaged in the manufacture of airplane engines and parts at several plants in Connecticut, including plants at East Hartford and Manchester (in the Pratt & Whitney Division) where the employees are represented by Local Lodge 1746 and at Windsor Locks and Broad Brook (in the Hamilton Standard Division) where the employees are represented by Local Lodge 743. The Local Lodges are affiliates of the International Association of Machinists and Aerospace Workers (hereinafter referred to as "the International"), and of its District Lodge 91. The Company is concededly an "employer engaged in commerce" and petitioners are "labor organizations" subject to the National Labor Relations Act. (A. 30a, 66a).

For many years prior to 1960, the Company and the respective Local Lodges were parties to collective bargaining agreements. The Lodge 1746 agreement expired on December 7, 1959, and the Lodge 743 agreement expired on April 21, 1960. A legal, federally protected strike for new agreements began June 8, 1960, and ended August 11, 1960 (A. 30a, 32a).

From June 8-13, the strikers engaged in mass picketing in front of the entrances to the employer's plants as well as assorted other acts of misconduct directed at individual non-strikers. On June 13, the state court approved and entered a stipulation (in which the Unions joined) prohibiting mass picketing and violence, but allowing picketing to continue. On June 16 a similar stipulation was entered by the federal court at the instance of the National Labor Relations Board, These stipulations limited the number of pickets and prohibited tortious conduct on the picket lines (state court) and also off the picket lines (federal court). After June 13 mass picketing ceased and, as authorized by the stipulations, picketing in limited numbers continued. Widespread publicity was given by television, newspapers and radio to the stipulations and to the restoration of order on the picket lines (A. 105a; II R. 64-65, D.F. 449-458; D.Ex. 34, 35, 36).

The record showed also that as early as June 10, foremen and employees who had returned to work informed other employees that it was safe to do so (II R. 65, D.F. 463). Newspapers covering the Hartford-Springfield-Middletown-New Britain-Manchester areas reported that picketing was orderly beginning June 11 (II R. 64, D.F. 453). By June 11, the State Police, assisting the local police, had brought the mass picketing under control (II R. 64, D.F. 452). Arrests of pickets for misconduct at or on the plant premises virtually ceased after June 13 (II R. 64, D.F. 457). The State Police were withdrawn on June 14 (II R. 65, D.F. 458). In anticipation of a strike, plaintiff had installed motion picture cameras at its plant gates, with which it recorded mass picketing and other misconduct. Although it kept some cameras in position after June 13, plaintiff stopped taking motion pictures after that day (A. 105a; II R. 64, D.F. 449,450). Whereas on Friday, June 10, 3,098 of approximately 16,200 bargaining unit employees reported to work at Pratt & Whitney and 365 of approximately 3,800 bargaining unit employees reported at Hamilton-Standard, on Monday, June 13, 4,273 and 522 reported at those plants. These numbers increased as follows in the next two weeks:

June 14 (Tues.) —P&W: 4,639; H-S: 598.
June 20 (Mon.) —P&W: 7,344; H-S: 1,208.
June 27 (Mon.) —P&W: 9,340; H-S: 1,634.
July 1 (Fri.) —P&W: 9,977; H-S: 1,744.

(IR. 285, 287 F. 634, 635.) A total of 4535 bargaining unit employees at Pratt & Whitney and 2019 bargaining unit employees at Hamilton-Standard remained out during the entire strike and registered as strikers to return to work at the end (IR. 244, F. 393, 394).

Although the courts below held that the Unions were liable only for the consequences of tortious acts on the picket lines and at the plant premises, and although these were isolated and sporadic after June 13 (A. 105a), the courts did not limit respondent's recovery through that date; they accepted the Company's contention that the after-effects of the fear induced by the

tortious acts prior to the injunctions continued through the week of July 1, 1960 (A. 105a-106a), *though not thereafter, (id.),* as the Company urged and as its witnesses had opined. Compare pp. 22-23 with p. 19, *infra.*

In determining the amount of absenteeism which was caused by violence directly and on this residual fear theory, the trial court did not rely on the testimony of absentees themselves, or on a projection based on a sample (representative or otherwise) of such absentees. Instead, it accepted, and relied exclusively upon the opinion of Morgan R. Mooney, the Company Personnel Director at the time of the strike, and its Vice President for Industrial Relations at the time of the first trial in these actions, see A. 99a, n. 2, A. 118a-119a. Mr. Mooney gave it as his opinion, and the trial court found, "that from June 9 up to and including July 1, the number of involuntary absences proximately caused by the tortious acts at or on the premises of the Pratt & Whitney plant were approximately 62,900 out of a total absences of the bargaining unit for the full period of the strike of approximately 266,000 or approximately 23.6%" and that at Hamilton Standard "[T]he involuntary absences numbered 17,600 out of approximately 91,000 during the strike period of 33 days or approximately 19.3%." (A. 105a, 106a).

We next describe the method by which Mooney arrived at these figures.

B. Mr. Mooney's Opinion and Its Deficiencies.

1. Mr. Mooney's Method.

Mr. Mooney described as follows the method and theory by which he arrived at his opinion as to the approximate number and percentage of involuntary absences each day of the strike (II R. 193, F. 268, Cf. II R. 72-78, D.F. 502-543).

1. The first figure in Mooney's calculations was an *estimated* number of "committed" or "hard core" strikers in each bargaining unit, by which he meant persons who would have stayed on strike for its duration, regardless of anything else (II A-P. 117). Because the infirmities in that estimate themselves fatally infect his opinion, and reveal in microcosm the methodological deficiencies of his whole approach, we describe and discuss that estimate in the margin.[3]

2. Mr. Mooney then subtracted the "committed strikers" from the number absent each day of the strike, a number not in dispute (A. 117a).

3. Mooney divided the remaining absentees into two categories: voluntary and involuntary due to defend-

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[3] He stated that he had based that estimate on (a) the number of union members who voted for the strike on May 26, 1960 (3488 at Pratt & Whitney and 1493 at Hamilton Standard); (b) the average number who were paid strike benefits during the strike, except for the first week of payments (as to which he considered the evidence unreliable) (3487 at Pratt & Whitney, 1298 at Hamilton Standard); and (c) the number who registered as strikers (4500 at Pratt & Whitney, 2000 at Hamilton Standard) at the end of the strike. He chose a number which he considered "reasonably related" to the aforesaid figures (II A-P. 108, 119). At Pratt & Whitney, he chose 3500; at Hamilton Standard, 1500 (II R. 193, F. 268).

This formula gives a certain patina of reason to Mooney's estimate, but closer inspection shows that the number chosen is merely the number of union members voting for the strike rounded off to the nearest hundred. There is nothing in Mooney's testimony, or elsewhere in the record—and the trier of fact did not find—that only union members who vote to go on strike will be committed to the strike if it occurs. Nor did the Company show, or the trier find, that Mooney's asserted formula for determining the number of committed strikers is predicated on industrial experience or otherwise validated. In fact, the number of strikers who did stay out to the end was far greater (see (c) above) and the trial court found that in the last month of the strike no one was absent because of violence (see p. 23 *infra*).

ants' tortious acts at the premises. In the voluntary classification he included all absences (voluntary and involuntary) for any reason other than fear or inability to cross the picket lines resulting from defendants' tortious acts at the plant premises. The number of *involuntary* absences chargeable to defendants was the ultimate fact to be determined. He formulated his opinion of *that* number on the basis of his "experience", by the following reasoning:

a. First, he *estimated* how many absences during the first three days of the strike were involuntary. This estimate was not shown to be anything more than speculation.

b. Involuntary absence thereafter he attributed to "residual fear" reinforced by tortious conduct on the picket line.

c. He *opined* that the volume and duration of such post-stipulation involuntary absence was substantial and that it continued throughout the strike. This opinion was not shown to be anything more than speculation .

d. He *estimated* the *amount* of that involuntary absence guided by the "trend lines", which showed an increasing number of absentees returning to work each day. He expressed his estimates as a percentage of the total absentees, less committed strikers, and as a percentage of the entire bargaining unit.

2. The Deficiencies in Mr. Mooney's Method.

a. *Mr. Mooney had no relevant experience or scientific aids.* Mr. Mooney's background and training consisted of his service in the federal government for two years as a labor compliance officer, seven years as

Connecticut Deputy Commissioner of Labor, in which position he had investigated a large number of strikes, and employment in labor relations capacities by the Company (personnel director during the strike and as vice president for industrial relations at the time of the first trial) (Note 2, A. 118a-119a).

However, nothing in Mr. Mooney's experience bore on the question of approximately how many or approximately what proportion of the strike period absences were caused by defendants' tortious conduct, or on any method for answering that question without input from the absentees themselves.[4] Nor did Mr. Mooney himself, although pressed, offer any connection between his experience and his opinion. In accepting Mooney's estimates through July 1, the trier and the Supreme Court of Connecticut (A. 105a and 121a) relied, in part, on Mooney's personal observation of the strike violence. They thus failed to distinguish between two different testimonial qualifications—observation and experience.[5] And finally, they took no account of the fact that Moon-

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[4] Before the 1960 strike, Mr. Mooney had talked to only 20 to 25 employees about their reasons for absence during a strike (II R. 192, F. 262).

Mr. Mooney had no prior experience in making estimates or ascertaining approximate percentages of the number of employees who were absent from work during a strike because of fear of violence or tortious conduct at the plant premises. He had no prior experience with a situation in which there was violence during the first few days of a strike and then a stipulation enjoining violence. (II R. 82, D.F. 573; II A-P. 132, A-P. 86). He had never interviewed any employees to discover their reasons for absence before or after such a stipulation (II 192, F. 263).

[5] The importance of the distinction and its implications are discussed in *Stephanofsky* v. *Hill*, 136 Conn. 379, 383, 71 A.2d 560, 562.

ey's observation was necessarily sporadic and, by his own admission, imperfect. (II R. 80-81, D.F. 560-566; II A-P. 129-130). Although Mooney relied on the number of cars he saw back up and leave during the first day of the strike, he described this as "100, 150, or possibly 200 cars" (II R. 80, D.F. 560); a margin of 100%.

b. *Mooney was biased.* The courts below treated Mooney's experience as the Company personnel director during the strike and subsequently as its vice president for industrial relations as affirmative qualifications (A. 99a, 118a-119a, n. 2 cont.). Their opinions do not show that they considered that his relationship to the plaintiff cast doubt upon the impartiality of his opinion.

c. *There is no logical nexus between the facts on which Mooney relied and his estimates.* Mooney was completely unable to describe how he proceeded from his factual assumptions to his ultimate numerical estimates of involuntary absence. Although Mr. Mooney was repeatedly asked to explain, his answers were uniformly evasive and unresponsive. At times he reiterated at length various aspects of the process described above. In the end, he declared simply that he knew how many employees were absent each day because of tortious conduct "on the basis of my experience. I reach that conclusion, that opinion, on the basis of my total experience." (II A-P. 127, 134-135.) It developed that what Mr. Mooney meant was that the estimates he made were, in his own "judgment", "reasonable":

> "* * * it was my judgment based on that experience, which I think is reasonably extensive, that this was a reasonable opinion for the absences

> proximately caused by the violence." (II A-P. 127-128).

To be sure, Mr. Mooney also testified:

> "* * * it is my view that *a reasonable probability is* that about half, in round figures, of the thirteen thousand [absentees on June 9 and 10] * * * were so affected by the intimidation and tortious conduct and the fear induced by them, that they remained away from work for that reason" (emphasis added; II A-P. 126-127).[6]

But he offered no explanation whatever of how he hit upon the number 6500, or to any reasoning which led him to conclude that 6500 was a more "probable" number than any other. Dr. Herbert Northrup, Chairman of the Department of Industry of the Wharton School of Finance and Commerce of the University of Pennsylvania (Note 2, A. 117a-118a), also gave his opinion as to the number of involuntary absences, purporting to follow the same method. (As will be discussed at pp. 19-20 below, his estimate of daily involuntary absenteeism differed substantially from Mooney's). He, too, was unable to describe any logical nexus between his premises and his conclusion. Particularly revealing is the following colloquy between the Referee and Dr. Northrup:

> "The Referee: What is your answer? Is there any scientific basis? Is there any principle that can be taught to others in a school of learning that would assist one in arriving at these conclusions?

[6] Cf. (II A-P. 134): "I'm not attempting to say anything with reasonable certainty. All I'm trying to do is to deliver myself of opinions with reasonable probability * * *."

> The Witness: Well, Your Honor, if I were asked this question in a classroom I would give an answer based upon my experience and background and try to help the student arrive at a conclusion. And that's the best I could do. I have testified there is nothing in writing or nobody of knowledge in the learned journals upon which we could rest." (II A-P. 103-104).

In fact, Dr. Northrup's method *cannot* be taught to others as he himself virtually admitted (II A-P. 86).

d. *Defendants' experts confirmed the absence of any logical nexus.* To aid the trial court in evaluating the character of the opinions proffered by the Company through Mooney and Dr. Northrup, defendants presented five distinguished behavorial scientists from various disciplines and a non-academic practitioner of industrial relations (A. 121a).[7]

Each testified that one could not tell, after studying Dr. Northrup's and Mr. Mooney's testimony, how they had arrived at the starting figure for their involuntary absence "trend lines" or how they came to their percentage figures (II R. 96, 97, D.F. 632, 636; II A-D. 23, 166-167). They discovered no method of determining how Dr. Northrup and Mr. Mooney weighted the

[7] Dr. Mason Haire, Alfred Sloan Professor of Management, Massachusetts Institute of Technology (industrial psychology); Dr. Albert Rees, Professor of Economics, Princeton (labor economics); Dr. Seymour Martin Lipset, Professor of Sociology, Harvard (labor sociology); Dr. William Gomberg, Professor of Management in Industrial Relations, Wharton School, University of Pennsylvania (industrial engineering); Dr. Hjalmar Rosen, Professor of Industrial Psychology, Wayne State University (industrial psychology); Wayne L. Horvitz, independent management consultant specializing in labor relations.

various factors they considered or how they combined those factors (II R. 96, D.F. 632).[8]

[8] Thus, Professor Haire testified:

> "[T]here's no logic between the total numbers of people employed and the percents [Dr. Northrup] comes to. There's just a gap that isn't filled with logic and I don't think that anyone else can go over the same steps he did and come out with the same number he did. He doesn't say how he got that. That's the sense in which I don't think I could come up to the same figures he did • • •. [T]here's no method given for handling those factors. [Dr. Northrup] doesn't tell you how he did it. He doesn't tell you what weight or what interaction, so that it's impossible to use those to come to any precise conclusion. One would have to think about these factors and then guess. That would be all, I think, I or • • • any other expert • • • could do." (II A.D. 17-18).

With respect to Mr. Mooney, Professor Haire testified (II A.D. 22):

> "I don't know how he came to the percentage figure any more than I know how Professor Northrupt came to the percentage figure. It's an interesting percentage figure but I don't see at the moment that it's convincing and I must say I don't think any expert is going to be able to produce a percentage figure on the basis of his expertise."

> "Q. • • • [T]he fact that he started with deducting the committed strikers, has it added substantially to your ability to arrive at a figure of what percentage of the balance were absent due to violence or fear?
> A. No, it hasn't added substantially to my ability to do it. It's another interesting approach but this doesn't seem to me to add substantially to the ability to pin it down • • • with reasonable probability." (II A.D. 22-23).

Mr. Horvitz testified:

> "[M]y problem is with putting any number on it, not with putting a specific number on it. I'm not impressed with the fact that Dr. Northrup reaches one number and somebody else reaches another number and which should you choose between the two. • • • [T]his one does not lend itself to quantification in my judgment." (II A-D. 57).

Mr. Horvitz also testified that he had the same difficulty with Mr. Mooney's analysis as he did with Professor Northrup's. The information relied on by Mr. Mooney did not constitute reasonable

Although he did not accept their testimony,[9] the trier did not purport in his opinion or findings to iden-

grounds for the formation of any opinion or judgment as to percentage of absence due to fear with a reasonable margin of error (II A-D. 55).

Professor Lipset testified:

> "* * * I would say he just had a paucity of the necessary information.
>
> Q. What's the consequence? What does his opinion amount to?
>
> A. It's a guess which he can make and anybody can make.
>
> I said, if I may, my own judgment, to come up with a fifty percent figure strikes me as a curious guess. You know, why fifty? Why not forty-five? Why not sixty? I don't see—I don't see any basis for coming—you know, when Gallup, for example, on the basis of—or anybody on the basis of a national random sample reports on the attitudes of a population, he will say, you know, within a certain margin of error, and the smaller the sample the greater the margin of error, and more questions, the greater the margin of error. There is no indication. It's just an offhand guess of fifty per cent in one case, thirty-three per cent in another. * * *
>
> * * *
>
> On the basis of what I have read * * * it seems evident to me that a certain unknown percentage, that, you know, intimidation was present and that there must have been some workers who did not go to work for shorter or longer periods because they felt intimidated either on the picket line or elsewhere. * * * On the other hand, what that percentage was * * * is something which I just don't have enough information * * *." (II A-D. 65, 68-69, 88-89).

See also Professor Gomberg, II A-P. 160-161, 166, 168; Professor Rees, II A-P. 137-138, 140-141; Professor Rosen, II A-D. 39.

[9] The Referee "did not accept the testimony of [defendants' experts] with respect to the opinions given by Professor Northup and Mr. Mooney" (II R. 201, F. 294), but he did not identify what portions of their testimony he did not accept or explain why he rejected it. The trier's rejection cannot have been based on the theory that they were not sufficiently expert in their own fields, for he found that they constituted "a group of eminent authorities in the field of labor, economics, social science, including psychology, as well as statistics" (A. 101a). See also A. 104a-105a, where the trier affirmatively relied on their testimony.

tify any logical nexus between Mooney's premises and those of his conclusions the trier accepted. Nor did the Supreme Court of Connecticut supply this critical omission.

In response to an inquiry from the Referee, Professor Gomberg distinguished between an estimate derived by inference from data which will logically support it, and a "subjective,.intuitive," guess, or speculation (II A-D. 168). Although directed to Dr. Northrup's testimony, Gomberg's reasoning applies as well to Mr. Mooney.

> "There is a technique of logic which gives us the laws of inference. And the laws of inductive logic in turn which are based on the precepts of mathematical statistics, give me a sanction for generalizing from the particular to the general under certain circumstances. I see no evidence of that procedure on [Dr. Northrup's] part, that justifies his quantitative figures."

In answer to the Referee's question, "When is * * * deduction pure speculation; when is it reasonable?", Professor Rees stated (II A-D, 145-146): "When the maker doesn't have sufficient facts to enable him to draw an inference with any accuracy." See also, Professor Lipset, II A-D. 65, 74; Professor Haire, II A-D. 16-18 (Dr. Northrup's percentage estimate "was just a wild guess").

e. *Defendants' experts established that Mooney's method is not recognized in any profession.* Neither Mr. Mooney nor Dr. Northrup nor any other witness testified that the Mooney-Northrup "process" or "method" of estimating the number and percentage of involuntary absentees is "accepted in his

branch of learning" (II A-P. 86) and none of defendants' experts had ever seen or heard of it before. Defendants' experts, whose collective expertise covers all scientific disciplines relevant here, agreed that *the only* source from which an inference could be drawn as to a reasonably approximate amount or proportion of involuntary daily absence is data based upon the accurately ascertained subjective motivation of absent individuals (A. 122a; II R. 92, D.F. 605; II A-D. 5-6, 17, 29, 32-34, 38, 51-52, 54-55, 89, 137-138, 140). This could be probed through each absentee individually, or by representative sampling, through interviewing, or by testimony (II R. 63, 92, D.F. 445, 606; II A-D. 147-148, 82-83), with results of varying degrees of accuracy. They testified uniformly that except by examining the employees' subjective reasons there is *no probative source of evidence* to support *any* inference as to the reasonably approximate quantum of involuntary absence an any day or all days of the strike (II R. 92, D.F. 605, 607, II A-D. 6-7, 16-19, 27, 29, 36, 37, 49-51, 56-57). Without such evidence, "there is no field of expertise that will make possible other than a speculative response" (II A-D. 10).[10]

[10] Dr. Northrup inadvertently corroborated this testimony in explaining why he was unable to make an approximation of the number of employees who returned to work each day because they could no longer stand the economic privation (rather than) the ebbing of fear (II A-P. 92):

> "Because I did not interview and find out the economic situation for each individual worker or reasonable sample thereof who returned to work on each particular day."

3. Objective Evidence Bearing on the Reliablity of Mooney's Method.

a. *The extent of variance between the estimates of Mr. Mooney and Dr. Northrup.* The trier properly observed (A. 105a) that

> "[I]n estimating the number of involuntary absences, the daily total in the early period was greater in Dr. Northrup's opinion than the number indicated by Mr. Mooney, while in the latter period of the strike, it was the reverse."

But he did not focus on, and therefore failed to draw the appropriate conclusion from, the *extent* of the variance between them. To demonstrate the variances we have plotted their estimates of daily involuntary absence at Pratt & Whitney and Hamilton Standard on Charts 3 and 4, annexed, with accompanying tables, *infra.*

For example, Dr. Northrup estimated that on June 13, there were 7822 involuntary absentees at Pratt & Whitney (II R. 188, F. 248). Mr. Mooney estimated that on that date there were 5500 (II R. 194, F. 269). Dr. Northrup's estimate is 42 percent higher than Mr. Mooney's (Table 3A, *infra.*) [11]

Even greater discrepancy appears when their estimates of involuntary absence at the end of the strike are compared. For example, Dr. Northrup estimated that at Pratt & Whitney, on July 29, there were 577 involuntary absentees (II R. 188, F. 248). Mr. Mooney estimated 1000 (II R. 195 F. 269), 73 percent more

[11] Dr. Northrup estimated that on that day there were 1914 involuntary absentees at Hamilton Standard (II R. 189, F. 249). Mr. Mooney estimated 1500 (II R. 195, F. 272). Dr. Northrup's estimate is 28 percent higher than Mr. Mooney's (Table 4A, *infra*).

(Table 3A, *infra*).[12] At Hamilton Standard there was never a difference of less than 15 percent, and for the dates between July 15 and the end of the strike the difference ranged from 129 percent to 171 percent (Table 4A, *infra*). At Pratt & Whitney there were, after the first two days seven days on which the difference was less than 10 percent but it was already as high as 46 percent and 47 percent during the first full week of the strike and after the 4th of July it was less than 15 percent only twice and ranged as high as 95 percent (Table 3A, *infra*).

b. *The trend lines established by plaintiff's involuntary absence witnesses prove that Mooney's are fictitious exaggerations.* At the first damage trial the Company produced 212 employees handpicked by its counsel, each of whom had been absent for one or more, but less than all, days of the strike, who testified that their absence had been involuntary.[13] At the second damage trial the Company introduced a transcript of 73 of these witnesses and one hundred and thirty-five additional hand-picked witnesses. (A.116a, 101a-102a). Company counsel did not claim that these witnesses had been selected by any randomizing technique or that the universe interviewed included all employees still on the Company's payroll who had

[12] Dr. Northrup estimated that at Hamilton Standard on August 8 there were 200 involuntary absentees (II R. 188, F. 248). Mr. Mooney estimated 500 (II R. 196, F. 272), 150 percent more. (Table 4A, *infra.*)

[13] The trial court found that the testimony of these witnesses established "a clear pattern of lost work days directly and proximately attributable to the illegal acts of the defendants" (A. 57a) but failed to describe what the pattern was.

been absent during the strike;[14] he did not even deny that the witnesses had been selected for the purpose of maximizing an impression of extended involuntary absence. No explanation was ever offered for the Company's failure to despose or call all available strike period absentees whose absence the Company claimed was involuntary, or even to call or despose an unbiased, random, sample of all absentees still in its employ.

The Mooney involuntary absence estimates and his involuntary absence "trend lines" are in conflict not only with the facts, but with the "trend line" or "pattern", p. 20, n.13 *supra,* established by collation of the testimony of the Company's winesses. Of those who testified that their absence was involuntary, 77 percent at Pratt & Whitney and 75 percent at Hamilton Standard had returned to work by June 20 and 93

[14] Of the 16,000 employees in the Pratt & Whitney Division bargaining unit at the time of the strike 6800 remained on the Company's payroll at the time of the 1972 retrial. Of these 6800, 3800 had been absent one or more days but not for the entire duration of the strike, and 1600 had stayed out during the entire strike (II R. 139, F. 10). Of the 4350 employees in the Hamilton Standard Division bargaining unit at the time of the strike, 1550 remained on the payroll at the time of the 1972 retrial. Of these 1550, 1000 were absent one or more days but not for the entire duration of the strike, and 500 had stayed out during the entire strike (II R. 139, F. 11).

The Connecticut courts ultimately found that no absence after the week ending July 1 was involuntary (A. 117a, 105a.) Thus, by restricting the universe to employees who had been absent less than all days of the strike, rather than including "all who had refrained from work" (A. 87a), the Company excluded thousands of voluntary absentees who were easily available. This deliberate skewing precludes drawing from its witness "sample" any inference favorable to the Company as to the percentage of absence which was involuntary.

percent at Pratt & Whitney and 90 percent at Hamilton Standard had returned by June 27.[15]

Even disregarding the exaggeration inherent in the Company's biased witness collection, by comparison with it, Mooney's estimates of involuntary absence between June 17 and July 1 are vastly inflated, as appears from Charts 1 and 2, *infra*, and the following table:

	Pratt & Whitney				Hamilton Standard			
				Plaintiff's				Plaintiff's
Date	Mooney	Estimate	Witness	Sample	Mooney	Estimate	Witness	Sample
	No.	% *	No.	% *	No.	% *	No.	% *
6/9	6500	100	113	100	1500	100	20	100
6/13	5500	85	88	78	1500	100	20	100
6/17	4500	69	50	44	1100	73	9	45
6/24	2600	40	11	10	800	53	4	20
7/1	1800	28	4	3.5	600	40	1	5

* In this Table the figures in the number columns for June 9 equal 100%. Subsequent figures in each % column show the percent for that date as compared with the June 9 figure.

c. *The Referee's Own Decision Fatally Undermines Mooney's Estimates.*

The Referee found that:

> "Both Dr. Northrup and Mr. Mooney testified that the effects of * * * fear engendered by the tortious acts of the defendants at the gates of the Pratt & Whitney and Hamilton Standard Plants were a proximate cause of involuntary absences of a portion of the plaintiff's direct labor employees down to the end of the strike." (A. 104a).

[15] Only 4 out of 113 at Pratt &Whitney and 2 out of 20 at Hamilton Standard were still absent on July 1, and the Referee refused to believe that the absence of even this handful after that date was attributable to fear.

The Referee discredited this testimony. He said (*id*):

> "Taking into consideration the injunction of June 13, 1960, a similar injunction issued by the U.S. District Court of this State, the cessation of film taking by the plaintiff of picket activity; the withdrawal of the state police; the widespread publicity both on T.V., Radio and the newpapers of the issuance of the injunctions, I am not persuaded that the after effects of the fear induced by the tortious acts of the defendants caused involuntary absences, after the week ending July 1, 1960."

Nevertheless, the Referee adopted Mr. Mooney's estimate of the amount of strike absence *up to July 1* which was involuntary. In doing so, he overlooked that his own finding established that Mooney had virtually ignored and grossly undervalued the fear-dissipating effects of the events of June 11 to July 17, on which the Referee relied. That error did not merely infect and invalidate Mooney's estimates of involuntary absence after July 1, it similarly infected and invalidated his estimates before July 1.[16] It did so for several reasons.[17]

First, Mooney used the same facts, assumptions and method of computing daily involuntary absence

[16] The same is true, of course, of Northrup's estimates.

[17] Mooney's method is further impeached by the first decision of the Supreme Court of Connecticut. Mooney had given his opinion with "reasonable probability" as to how long the strike would have lasted had there been no violence, but the court found that this opinion was too speculative to be accorded "significant weight" (A. 84a-85a). Mooney gave no explanation as to why his quantification of involuntary absence was more reliable than his estimate of strike duration, which was based on that quantification (A. 84a-85a), and neither the Referee nor the Supreme Court in its second opinion explained the difference.

throughout the strike. There is no rational basis for believing that his judgment on this matter has any worth whatsoever if he so completely misunderstood the dynamics of the situation that he ascribed fear as the reason for absence of 1800 employees (at Pratt & Whitney alone) as of July 4, whereas the trier of fact found that *none* of the absences on that date were involuntary.

Second, Mooney's estimates of pre-July 1, involuntary absence were based on the assumption that 1000 of the registered strikers at Pratt & Whitney and 500 at Hamilton Standard had been absent involuntarily throughout the strike. (II R. 83, 196 D.F. 577, 595, F. 272). In other words, the starting point of his analysis was that although more than 4500 employees registered as strikers (that is, were absent during the entire strrike) at Pratt & Whitney and 2000 at Hamilton Standard, only 3500 at Pratt & Whitney and 1500 at Hamilton Standard were "committed" strikers who had voluntarily gone on strike and stayed out voluntarily for its duration. See p. 9, n. 3 *supra.* By his findthat none of the absences from July 1 to the end of the strike were involuntary (A. 105a), the trier destroyed the starting point of Mooney's analysis and every single figure thereafter.

Third, reasoning backwards in time from the Referee's finding that 1800 absentees at Pratt & Whitney and 600 at Hamilton Standard whom Mr. Mooney counted throughout as involuntary were not absent, as of July 4, involuntarily, it follows that their absence from June 9 to July 1 likewise cannot be attributed to fear. For, there was no testimony by Mooney (and no other evidence in the record), and the Referee did not find, that anything occurred on the weekend be-

tween July 1 and July 4 to transform 2400 "involuntary" absentees into "voluntary" absentees. The finding that their absence after July 1 was not involuntary therefore required deducting 1800 at Pratt & Whitney and 600 at Hamilton Standard from Mooney's daily involuntary absence totals each day *prior* to July 1.

Adjustment of the "trend lines" to show disappearance of involuntary absence by July 1 is plotted in Charts 1 and 2 and accompanying Table 1A and 2A, *infra.*

In sum, the Referee's own findings strip Mooney's pre-July 1 daily involuntary absence figures of their only supporting structure.[18]

II. THE HISTORY OF THIS LITIGATION.

A. The Liability and First Damage Trials.

The case was assigned for trial to Gaffney, J. The trial was bifurcated into liability and damage stages. After the liability trial the court found defendant unions liable for violence at the plants' premises, primarily by mass picketing during the first few days of the strike before the June 13 stipulation and also for various vicious and lawless acts, referred to as "night

[18] Even if, notwithstanding all of the foregoing, the Mooney "method" were given credence, that is, if one were to assume that there were involuntary absence trend lines as postulated by Mooney, but reduced by 1800 at Pratt & Whitney and 600 at Hamilton Standard, the percentage of involuntary absence at Pratt & Whitney would be diminished from 23.6 percent to 12.1 percent (II R. 202, F. 299), and at Hamilton Standard from 19.3 percent to 8.1 percent (II R. 202, F. 301). Plaintiff's damages at Pratt & Whitney would thereby be reduced from $979,200 (II, 212, F. 355) to $508,337, and at Hamilton Standard from $444,811 (II R. 212, F. 356) to $172,682.

riding", which were committed by individuals away from any of plaintiff's plants. (A. 27a-55a, 75a-80a).

In first damages trial the Company presented various theories including, *inter alia,* that the unions were responsible for its entire strike loss; that they were responsible for the loss after the point at which the strike would have ended but for violence; and that they were responsible for all involuntary absences. As to the latter point, the Company asserted that it was impossible to separate involuntary absences from voluntary absences, but that if it was possible, the burden of separation was on the defendants (A. 81a-82a). The Company did not seek to prove involuntary absenteeism by testimony of the employees themselves, although they obviously knew best their own motivation—which was the point at issue. Nor did the Company offer a representative sample of such employees; that is, a sample chosen on a random basis. Rather, it offered some employees, chosen by Company counsel, who had returned to work before the end of the strike and who testified that their absence was involuntary. These, the Company argued, established a "pattern," from which the trier could draw "inferences." Lastly, the Company offered two "experts," Dr. Herbert Northrup and Mr. Morgan R. Mooney, who estimated the amount of involuntary absenteeism on each day of the strike and testified that the strike would have ended sooner but for the violence. They attributed the continuation of substantial involuntary absence after the third week of the strike to fear engendered by the "night riding" (I R. 293, F. 651).

Judge Gaffney adopted the opinion of Dr. Northrup that, absent violence, the strike at Pratt & Whitney would not have lasted beyond three weeks and that at Hamilton Standard it would not have extended

beyond four to six weeks (*id.*). He also accepted Northrup's estimate that at the end of the three-week period fear was the reason that 50 per cent of the employees did not report to work, a figure which Northrup reduced to 25-33⅓ per cent by the end of the strike; he also believed Northrup's estimate that at the end of the strike 20 per cent of the Hamilton Standard work force failed to report due to fear (A. 57a-58a).

B. The First Opinion of the Supreme Court of Connecticut.

Both parties appealed to the Supreme Court of Connecticut. That court sustained the liability determination except with respect to incidents not connected to union officers and incidents away from the plants, which it held could not be attributed to petitioners (A. 79a-80a). The court held that because of this error in the liability determination, a new trial on damages was necessary. It then instructed the trial court on how to proceed on the retrial (A. 80a-81a). It held that proof of how long the strike would have lasted absence violence is unnecessary; plaintiff could obtain damages for involuntary absence at any time during the strike (A. 85a). With respect to proof of that issue, the Court said (A. 87a):

> "The court made its determination * * * mainly on the basis of the testimony of [Dr. Northrup] * * * who was permitted, over the defendants' objection, to state his opinion as to the percentage of the plaintiff's employees who stayed away from their employment involuntarily, and the reception of this evidence by the court is assigned as error by the defendants. While expert opinion would be relevant provided the court accorded it persuasive weight as was done in these cases, other methods of determining the element of involuntary absence of equal or greater weight might be resorted to such as a representative sampling of employees who refrained from work. The evi-

dence to be relied on for arriving at a reasonable approximation is for the court to decide."

C. The Second Damage Trial.

On remand, the case was assigned to the Hon. Joseph E. Klau, State Referee. Despite the invitation of the Supreme Court of Connecticut, plaintiff did not offer to produce a sample of available absentees *selected at random,* that is one which was representative in a statistically meaningful sense. Again, the Company offered opinion testimony of Dr. Herbert Northrup and Mr. Mooney which challenged as unscientific guesswork, pp. 14-18, *supra,* petitioners' witnesses.

The Referee construed the above quoted portion of the opinion "to mean that the testimony of Dr. Northrup and Mr. Mooney were admissible, and that it could be accorded persuasive weight if in the opinion of the trier it was entitled to it" (A. 101a).

He decided to accord it "persuasive weight" because (absent any evidentiary support and contrary to the testimony of all defendants' expert witnesses):

> "In view of the practical and legal problems of obtaining reliable data from a statistically representative sample of absentees either during or immediately after the strike, the State Referee, acting as the Court, finds that at no time during or after the strike was plaintiff able to obtain reliable data from a statistically representative sample of absentees for introduction into evidence." [19] II R. 201-202, F. 297.

[19] Plaintiff had adduced no evidence of any "practical and legal problems of obtaining reliable data" from all or a statistically representative sample of absentees immediately after the strike, when virtually all absentees were available and memories were fresh. Nor did it adduce any evidence that "difficulties" of any kind were the reason it did not then undertake a representative sampling. The portion of the above quotation beginning "The State" and ending "time" is inadvertently omitted from the Appendix, A. 119a.

However, the Referee did not find that it was impractical for plaintiff to have presented as witnesses at the retrial a sample of available absentees selected at random.

As stressed at pp. 22-25, *supra,* the Referee found that after July 1, 1960, no employee was absent either because of the aftereffects of fear induced by defendants' tortious conduct before the stipulations, or because of tortious conduct thereafter (A. 105a).

The portion of plaintiff's strike loss attributable to defendants was arrived at by obtaining the percentage of involuntary absence days compared to total strike absence days derived from Mr. Mooney's estimate of involuntary absence days to and including July 1, and applying that percentage to the total strike loss alleged by the Company (A. 105a-106a).

D. The Second Decision of the Supreme Court of Connecticut.

The Supreme Court of Connecticut approved the Referee's acceptance of Mooney's speculative estimates. It reached that result by eschewing or misapplying rules indispensable to effectuation of the limitation acknowledged in its first opinion, namely, that state courts are bound to limit recovery to the consequences of only those strike absences which are proved by competent, probative, evidence to have been caused by "tortious acts" (A. 82a, 81a).

In its first opinion (A. 85a), the court had cited *Stephanofsky* v. *Hill,* 136 Conn. 379, 384-385, 71 A.2d 560, 563, for the proposition that expert opinion, if speculative, cannot be relied on as probative.[20]

[20] In *Stephanofsky* the court held the opinion of an expert as to the cause of an accident speculative because the facts relied on did not exclude the possibility of other causes. Under that ap-

In its second opinion, the court substituted a much earlier, far less sophisticated, statement governing admissibility of expert testimony:

> " 'The true test of the admissibility of [expert opinion] testimony is not whether the subject matter is common or uncommon, or whether many persons or few have some knowledge of the matter; but it is whether the witnesses offered as experts have any peculiar knowledge or experience, not common to the world, which renders their opinions founded on such knowledge or experience any aid to the court or the jury in determining the questions at issue.' Taylor v. Monroe, 43 Conn. 36, 44, cited with approval in Schomer v. Shilepsky, —Conn. (37 Conn. L. J., No. 4, pp. 10, 12). Implicit in this standard is the requirement, later articulated, that the expert's knowledge or experience must be directly applicable to the matter in issue. Siladi v. McNamara, 164 Conn. 510, 513-14, 325 A.2d 277." (A. 120a-121a).

On this basis, the court held Mooney and Northrup qualified "to render opinions regarding [the extent of] involuntary absenteeism during the strike" (A. 117a, 119a). However, it failed to identify any relationship between their "observations" and "experience" on the one hand and capacity to quantify the motive for non-witness absence on the other, pp. 11-12, 13-14 *supra*. The court apparently ruled as a matter of law that the trier properly rejected the testimony of defendants' experts

proach the Mooney estimates "should have been excluded as a guess" (136 Conn. at 385, 386, 71 A.2d, at 563, 564), for it is not even asserted that the facts cited by the court (A. 121a) logically *exclude the possibility* that causes other than misconduct for which petitioners were held responsible (such as strike support or participation, unwillingness to alienate strikers, a "wait and see" attitude or sheer timidity) motivated all but a handful of the non-witness absences they classified as "involuntary."

that the facts on which Mooney and Northrup relied are not rationally sufficient to infer the motivation (in refusing to cross the picket lines) of the thousands of individuals to whom Mooney and Northrup had not spoken and about whose personal motivation they knew nothing. Nor did the court identify any logical nexus between the assertedly supporting matters they "took into account" (A. 121a) and their qualification to quantify.

The only apparent explanation for permitting an opinion as to quantum of involuntary absence to be derived in this fashion is the following:

> "The fact that the subjective motivation or state of mind, in this case the absentees' fear, could be inferred by the trier from other facts is a well settled rule of evidence. Frequently the only method of establishing what lay in the mind of a person when he acted is through such an inference." (A. 122a)

Incomprehensibly, the court *denied* that the Referee had "reject[ed] Mooney's opinion as to the number of persons who were still affected by fear after July 1" (A. 123a),[21] and likewise denied that the Referee had rejected Northrup's estimates of pre-July 1 involuntary absence insofar as they were inconsistent with Mooney's

[21] The court's assertion (A. 122a), that the Referee merely "placed more reliance" on Mooney's opinion with respect to the cause of pre-July 1 absences is refuted by the very portion of the Referee's opinion quoted in the next paragraph. The Referee found that Mr. Mooney was of the opinion that after July 1, the daily involuntary absences were limited to those who were afraid to return to work "until the strike was over". (A. 124a) In the face of the Referee's finding (A. 105a) that *there were no such absentees*, the court's reference to Mooney's "explanation" of the "leveling off of [involuntary] absences from July 1 to the termination of the strike" as "significant" passes understanding.

(A. 122a). In holding that the Referee's finding that fear was not the cause of any absences after July 1 (pp. 22-23, *supra*), "did not affect or destroy the weight which the court gave to Mooney's testimony and opinion concerning that period between the commencement of this strike and July 1, 1960" (A. 124a), the court ignored the necessary implications of that finding.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW UNDERMINES THE CONGRESSIONALLY PROTECTED RIGHT TO STRIKE BY AWARDING DAMAGES FOR CONDUCT NOT PROVEN TO BE PROXIMATELY CAUSED BY ILLEGAL CONDUCT.

A. When this Court last had before it a judgment for damages imposed upon a union for violence during a strike the Court said:

> "Our opinions on this subject, frequently announced over weighty arguments in dissent that state remedies were being given too broad scope, have approved only remedies carefully limited to the protection of the compelling state interest in the maintenance of domestic peace. Thus, in *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236, we read our prior decisions as only allowing 'the States to grant compensation for the consequences, as defined by the traditional law of torts, of conduct marked by violence and imminent threats to the public order,' *id.*, at 247, and noted that in *Laburnum*
>
> > 'damages were restricted to the "damages directly and proximately caused by wrongful conduct chargeable to the defendants . . . " as defined by the traditional law of torts. . . . Thus there is nothing in the measure of damages to indicate that state power was exerted to compensate for anything more than the direct consequences of the violent conduct.' *Id.*, 248, n. 6, at 249." (*Mine Workers* v. *Gibbs*, 383 U.S. 715, 729-730.)

The Court took special note that in prior cases in which relief by way of damages or injunction had been approved, the Court had satisfied itself that the damages had been limited to those proximately caused by violence, and that only violent conduct had been enjoined. The Court also pointed to *Youngdahl* v. *Rainfair, Inc.*, 355 U.S. 131, where it had modified an injunction issued against a background of violence to permit peaceful picketing:

> "'[t]hough the state court was within its discretionary power in enjoining future acts of violence, intimidation and threats of violence by the strikers and the union, yet it is equally clear that such court entered the pre-empted domain of the National Labor Relations Board insofar as it enjoined peaceful picketing . . . .'" (355 U.S. at 139, quoted at 383 U.S. at 730-731.)

Additionally, the Court analogized to *Teamsters Union* v. *Morton*, 377 U.S. 252, where

> "a similar analysis was applied to permit recovery under § 303 of damages suffered during a strike characterized by proscribed secondary activity only to the extent that the damages claimed were the proximate result of such activity; damages for associated primary strike activity could not be recovered." (383 U.S. at 731, n. 17.)

In sum, "[w]here the consequences of peaceful and violent conduct are separable, * * * it is clear that recovery may be had only for the latter" (383 U.S. at 732).

The courts below did not openly defy the principles established in those cases, but they did the next worst thing. They allowed respondent to recover an enormous damage award based not on probative evidence but on speculation that a large percentage of employee absence during the strike was caused by illegal conduct. Because, as detailed in our Statement and further discussed below, that speculation does not satisfy the requirements of logical inference, it fails to provide the requisite assurance that the huge damage award predicated upon it is "restricted to the 'damages * * * caused by wrongful conduct chargeable to the defendants . . .'," *(Gibbs, supra,* 383 U.S. at 730 quoting *Garmon* and *Laburnum).* Indeed, this record compels the conclusion that defendants have been charged for damage largely resulting from successful exercise of "a weapon of self-help permitted by federal law" *(Morton,* 377 U.S. at 259)—the strike and (after the first few days) peaceful picketing designed to induce employees to respect the federally permitted and protected picket lines. Cf. *Gibbs, supra,* 383 U.S. at 732, n. 18.

Ironically, and unbearably, the federally protected reaction of employees—not to work during the strike—has been transmuted by the alchemy of "expert opinion" into a financial liability of the Union to the employer. Unless state courts are to be allowed thus to transform strike absence from a federally protected right to a springe of union liability, the judgment below should be reviewed and reversed.

B. In *Letter Carriers* v. *Austin,* 418 U.S. 264, 282, it was said:

> "The Court has often recognized that in cases involving free expression we have the obligation,

> not only to formulate principles capable of general application, but also to review the facts to insure that the speech involved is not protected under federal law. [Citations omitted]
>
> 'We must "make an independent examination of the whole record," *Edwards* v. *South Carolina,* 372 U. S. 229, 235, so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression.' *New York Times Co.* v. *Sullivan; supra,* at 285.
>
> While this duty has been most often recognized in the context of claims that the expression involved was entitled to First Amendment protection, the same obligation exists in cases involving speech claimed to be protected under the federal labor laws. This obligation, derived from the supremacy of federal labor law over inconsistent state regulation, *Hill* v. *Florida ex rel. Watson,* 325 U. S. 538 (1945); *Teamsters Local 24* v. *Oliver,* 358 U. S. 283, 295-296 (1959), requires us to determine whether any state libel award arising out of the publication of the union newsletter involved here would be inconsistent with the protection for freedom of speech in labor disputes recognized in *Linn* [v. *Plant Guard Workers,* 383 U.S. 53]."

Here too, the Court has an "obligation, derived from the supremacy of federal labor law over inconsistent state regulation" to review the record to insure that the judgment below does not constitute a forbidden intrusion on the exercise of the federally protected right to strike, to picket and to respect peaceful picket lines. For, as *Gibbs* clearly indicates, the necessity of this Court's guarding federally protected labor conduct against potentially inconsistent damage awards is not confined to protected speech. Indeed, *Linn* equates the balancing state interest in awarding damages for defamation with the state interest recognized in *La-*

burnum and its progeny in awarding damages to preserve the peace (see 383 U.S. at 61-62.)

Directly applicable too is the observation in *Linn,* also repeated in *Letter Carriers:*

> "We think it important again to point out * * * that 'in view of the propensity of juries to award excessive damages for defamation, the availability of libel actions may pose a threat to the stability of labor unions and smaller employers.' *Linn,* 383 U. S., at 64. It is for this reason that the Court in *Linn* held that '[i]f the amount of damages awarded is excessive, it is the *duty* of the trial judge to require a remittitur or a new trial.' *Id.,* at 65-66". (418 U.S. at 287, n. 17, this Court's emphasis in *Letter Carriers.*)

Of course, state trial courts have a like *duty,* not to enter excessive judgments in non-jury cases; and state appellate courts have a *duty* to set such excessive judgments aside, for they share the Supremacy Clause obligation to avoid such a "threat to the stability of labor unions." But unless this Court reviews such unprecedented judgments as this one, where it appears that the state courts have shirked their duty, the duty is a meaningless form of words.

C. Acceptance of Mooney's estimates as "expert opinion" makes a shambles of the law of evidence. "Whatever may be the general formulation, *the essential requirement is that mere speculation be not allowed to do duty for probative facts, after making due allowance for all reasonably possible inferences favoring the party whose case is attacked." Galloway* v. *United States,* 319 U.S. 372, 395. Above all, it flouts what

Wigmore properly describes as one of two axioms of admissibility:

> "*None but facts having rational probative value are admissible.* This principle is indeed axiomatic, for any system of Evidence purporting to be rational. It assumes no particular doctrine as to the kind of ratiocination implied,—whether practical or scientific, coarse and ready or refined and systematic. It prescribes merely that whatever is presented as evidence shall be presented on the hypothesis that it is calculated, according to the prevailing standards of reasoning, to effect rational persuasion." *1 Wigmore, Evidence* 289 (3rd ed., 1940, emphasis in original.)

We earnestly submit that where a witness gives an opinion without being able to explain the reasoning process by which he reaches it and is unable to demonstrate a logical nexus between his factual premises and his conclusion, his opinion has no probative value. To offer such an opinion to a trier of fact is not to engage in rational persuasion, but to invite a leap of faith. Here, neither the witness himself, nor respondent's learned counsel on brief, nor the courts below have ever explained the connection between the facts and figures on which the estimates are assertedly premised and the estimates themselves.

Applicable to Mr. Mooney is the Sixth Circuit's rationale for rejecting the testimony of another expert witness: "How he arrived at this figure is unexplained. He applied no mathematical formula. It appears to be a figure arbitrarily taken out of thin air." *Volasco Products* v. *Fry Roofing Co.,* 308 F.2d 383, 392 (6 Cir.)

D. The court below invoked the rule of damages declared in *Story Parchment Co.* v. *Paterson Parchment Co.,* 282 U.S. 555, 563 (reaffirmed in *Bigelow* v. *RKO*

Radio Pictures, 327 U.S. 251, 264), that damages may be calculated "as a matter of just and reasonable inference, although the result be only approximate" (A. 115a-116a, 120a, 122a-123a). But it disregarded the essential corollary of that rule, that "even where the defendant by his own wrong has prevented a more precise computation, [which is *not* the case here, see pp. 40-44 *infra*] the jury may not render a verdict based on speculation or guesswork." *Bigelow*, 327 U.S. at 264. See also *Story*, 282 U.S. at 563. The decision below is thus inconsistent with the principle it purports to apply, and with those decisions, which are faithful to limitations inherent in the *Story-Bigelow* rule, such *Volasco, supra*, and *Coleman Motor Co.*, v. *Chrysler Corp.*, 525 F.2d 1338, 1352 (3 Cir. 1975), where the court, accepting *Story*, said:

> "damage figures advanced by plaintiff's expert may be substantially attributable to lawful competition. In the absence of any guidance in the record, we cannot permit a jury to speculate concerning the amount of losses resulting from unlawful, as opposed to lawful, competition."

A judge is no more entitled than a jury to attribute losses to unlawful rather than lawful causes on the basis of speculation.

E. The reasoning of the Supreme Court of Connecticut in sustaining the trial court's reliance on Mooney's opinion only introduced new errors into the analysis. We confine ourselves to the most significant:

1. The court held Mooney's opinion admissible on the theory that

> "subjective motivation or state of mind, in this case the absentees' fear, could be inferred . . . from other facts . . ." (A. 122a), quoted at p. 31, *supra*.

Heretofore, an inference of subjective motivation from "other facts" has been permitted only where those "other facts" have consisted of probative *behavior by the individual whose motive is in question*. Here there is *no* such behavior by which the motive of one non-witness absentee can be distinguished from another's. The rule that motive may legally be inferred from probative circumstantial evidence does not guarantee the existence of such evidence in every case or license an inference as to motive where there is no evidence which permits a *reasonable* inference. In this case absence is a neutral fact, and to infer *motive* from its mere *existence* is the essence of forbidden speculation. Possible reasons far absence during a strike are so numerous that the question whether any particular individual's absence was due to fear of violence, or solidarity with the union, or fear of social ostracism, or hope for economic gain if the strike is successful, is known only to the individual absentee. It follows that the only competent evidence is either the testimony of absentees themselves or of a representative sample.[22]

2. The court below recited at length Mooney's experience in industrial relations. But it failed to take

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[22] Mooney did not (A. 121a), because he could not, quantify, for example, the "employees who did not want to alienate fellow employees": he had not spoken to any of the strikers to learn how they felt. Cf. p. 18, n. 10, *supra*. But if he could not quantify those who were voluntarily absent for that reason, how could he know that any employees whose absence he attributed to fear were not absent because they "did not want to alienate their fellow employees"? And even if it be assumed, without any scientific basis, that the proportion of individuals in a group who were motivated by fear is uniquely subject to quantification, then how could Mooney distinguish (and thus quantify) those who were absent because of fear created by tortious conduct *on the premises*, if he could not quantify the "employees who were absent because of fear created by *tortious acts committed off the premises*", for which the court below had ruled the defendants were not liable (A. 79a-80a)?

account of the patent bias inherent in Mooney's long-time employment by the plaintiff, and his specially adversary relationship to the union as personnel director during a bitter strike, and later as vice president for industrial relations. Surely, such bias should have caused the court, if not to discredit his subjective estimates, at least to discount them. Contrast: *Norland* v. *Washington General Hospital,* 461 F.2d 694, 699 (8 Cir. 1972); *Thurber Corp.* v. *Fairchild Motor Corp.,* 269 F.2d 841, 845 (5 Cir. 1959); *Luria Brothers & Company* v. *United States,* 369 F.2d 701, 713 (Ct.Cl. 1966). See *II Wigmore Evidence,* p. 646 (3rd ed. 1940); *IIIA id.,* pp. 786-788.

Moreover, like plaintiff and the trial court, the Supreme Court of Connecticut failed to point to anything in Mooney's experience which qualified him to give the particular opinions which the state courts accepted, although those courts conceded that nexus between the witness' expertise and the precise question at issue is crucial to qualification, p. 30, *supra.* Cf. *Jenkins* v. *United States,* 307 F.2d 637, 646 (D. C. Cir., *en banc*), and particularly the concurring opinion of then Judge Burger, *id.* at 647 and 649-650.

3. In its first opinion the Supreme Court of Connecticut invited plaintiff to prove its damages on remand by use of a representative sample of all absentees (pp. 27-28, *supra*). The Company chose not to do so, proffering only a skewed group of involuntary absentees and the estimates of Mooney and Northrup (*id.*). In its second opinion, the court approved the trier's determination that because of "practical and legal obstacles * * * plaintiff was at no time able to present a statistically valid sample" (A. 119a), and his acceptance of Mooney's estimates as a substitute therefor (p. 28, *supra*). This, too, was grave error:

a. Assuming, *arguendo,* that a representative sample of all strike period absentees was unobtainable, and that a representative sample of all absentees available at the time of the second damages trial would not have provided an acceptable basis for inference as to the quantum or percentage of strike absence which was involuntary, acceptance of Mooney's opinion would still be unjustified. There is no rule of law which allows a plaintiff to maximize his recovery on the basis of incompetent evidence simply because no competent evidence is available. To allow him to do so is not only to dilute his burden of proof, but to reach a judicial judgment which has no rational basis. As the Court of Appeals for the Seventh Circuit said recently:

> "It is true, of course, as Hoefferle points out and as we have held above, that damages need not be calculated with mathematical precision. It is also most unfortunate that the deaths of Clarence and Dolly Hoefferle may have the effect of precluding the recovery of damages which rightfully belong to their company. But as disagreeable as this result may be, it does not vitiate the rule that damages must be proved with at least a reasonable degree of certainty, [citation omitted] which we do not here perceive."[23]

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[23] *Hoefferle Truck Sales* v. *Divco-Wayne,* 523 F.2d 543, 553 (7 Cir., 1975). The Court continued:

> "The admitted fact of damages, moreover, as presumably established by the liability trial, will not suffice to prove the amount of damages. [citations omitted]
>
> The evidence, in short, created little more than a speculative inference of the extent of Hoefferle's injury, and it was therefore properly excluded."

So it is here.

Even more striking is Judge Learned Hand's opinion, reaching what he called "the lamentable result" of denying a plaintiff recovery for profits which the defendant had obtained in violation of an injunction, because the defendant *had destroyed* the records which would have made possible computation of his profits. *Sunbeam Corp.* v. *Golden Rule Appliance Co.,* 252 F.2d 467, 471-472 (2 Cir.) (concurring opinion). Judge Hand approved the reasoning of the early case of *Yesbera* v. *Hardesty Mfg. Co.,* 166 Fed. 120, 123 (6 Cir.): "Of course if, in the absence of the better proof, there is still nothing of substance left on which the court can lay hold, there is no help, and the plaintiff must endure his loss." And Judge Hand added: "Much as we should like to find a way by which to compute the profits, we cannot do so * * *." (252 F.2d at 472.)

b. The trial court's impossibility finding, quoted at p. 28, *supra,* is contrary to the expert testimony (II R. 94, D. F. 624, II R. 201, cf. F. 295), and, in any event, is irrelevant to the question of why plaintiff elected to present a biased witness sample and speculative expert opinion in lieu of a random witness sample selected from all currently available absentees.

> "Proof of necessity [for using a representative sample] does not require a showing of total inaccessibility to proof of the facts desired to be shown, but the offeror must show the impracticability of making his proof by conventional methods. [Footnote omitted.]" Manual for Complex Litigation, 1 Part 2, *Moore's Federal Practice* (2d ed.), pt. 2.712, p. 97.

The "conventional method" in this case required plaintiff to produce for cross-examination each employee whose absence plaintiff claimed was involuntary. *Automobile Workers* v. *Russell,* 356 U.S. 634; *NLRB* v. *Madison Courier, Inc.,* 472 F.2d 1307 (D.C. Cir., 1972). As we have seen, plaintiff did not prove that this was "impracticable." But assuming, *arguendo,* that it was, plaintiff was required to prove causation by the best evidence reasonably obtainable. If the hearsay objection is to be overcome because large numbers are involved, the condition precedent necessarily must be proof of compliance, as fully as possible, with judicially approved techniques and procedures for random, *i.e.,* unbiased, sampling. Since no legal or practical problems prevented plaintiff from presenting a witness sample chosen at random from the proper universe of available absentees, rather than a collection of hand-picked examples, that is what it was required to do. Projection from such a sample, at the least, would have tended to corroborate or contradict the opinion testimony.

The present situation is therefore identical to that in *Galloway* v. *United States,* 319 U.S. 372, where this Court emphatically disapproved another attempt to substitute "expert * * * inference" for available evidence:

> "The only reasonable conclusion is that petitioner, or those who acted for him, deliberately chose, for reasons no doubt considered sufficient (and which we do not criticize, since such matters, including tactical ones, are for the judgment of counsel), to present no evidence or perhaps to

withhold evidence readily available * * * and to trust to the genius of expert medical inference and judicial laxity to bridge this canyon.

"In the circumstances exhibited, the former is not equal to the feat, and the latter will not permit it. *No case has been cited and none has been found in which inference, however expert, has been permitted to make so broad a leap and take the place of evidence which, according to all reason, must have been at hand.* To allow this would permit the substitution of inference, tenuous at best, not merely for evidence absent because impossible or difficult to secure, but for evidence disclosed to be available and not produced. This would substitute speculation for proof." *Id.* at 386-387, footnote omitted, emphasis added.

4. The courts below determined that the employee witnesses were not a representative sample "of all the employees employed in 1960, in a statistical or scientific sense" (A. 119a), and assumed that that justified totally disregarding it. They refused to acknowledge, as defendants had urged, that while the sample was unrepresentative, it permitted, and indeed required, the drawing of an inference *against plaintiff*. The inference is that absentees whom plaintiff did not call would have given testimony that was no more (and most probably less) favorable to plaintiff than the absentees it did call. Since even the biased sample proves that the witness' estimates were gross exaggerations (pp. 21-22, *supra*), the inference is inescapable that a random sample would have proved that involuntary absence was a miniscule percentage indeed.

II. THE DECISION BELOW DEPRIVED DEFENDANTS OF PROPERTY WITHOUT DUE PROCESS OF LAW

This Court has held, in a variety of contexts, that a judicial or administrative determination which, without *some evidence,* deprives a person of liberty or property, is a denial of due process of law. *Thompson* v. *Louisville,* 362 U.S. 199, anticipated in *Schware* v. *Board of Bar Examiners,* 353 U.S. 232, 246-247, and *United States ex rel. Vajtauer* v. *Commissioner,* 273 U.S. 103, 106, and frequently followed. See *e.g., Shuttlesworth* v. *Birmingham,* 382 U.S. 87, 94-95; *Johnson* v. *Florida,* 391 U.S. 596; *Douglas* v. *Buder,* 412 U.S. 430; *Vachon* v. *New Hampshire,* 414 U.S. 478; cf. *Boilermakers* v. *Hardeman,* 401 U.S. 233, 246; *Wood* v. *Strickland,* 420 U.S. 308, 323, n. 14.

We submit that because the conclusion that the Company suffered losses caused by defendants' tortious activity in the amount of over $1,400,000 is not based on any rationally persuasive "evidence" (see most particularly pp. 36-37 *supra*), the judgment denies petitioners due process of law. At the very least, acceptance of Mooney's estimates raises a serious due process question which this Court should consider.

Of course, the Company did proffer testimony, which the courts below accepted *as if it were rationally probative evidence,* to justify the damage award. But so did the parties who had prevailed below in the cases this Court reversed for lack of evidence. In *Thompson* itself the Court examined the record and determined that while there was testimony, "[t]here simply is no semblance of *evidence from which any person could reasonably infer*" (362 U.S. at 205, emphasis added) the essential element of the offense charged. And in *Schware,* although the Board of Bar Examiners had relied on

"certain facts in the record which raised substantial doubts about his moral fitness to practice law", 353 U.S. at 240 (described *id.* at 240-246), this Court concluded that "[t]here is no evidence in the record which *rationally justifies a finding* that Schware was morally unfit to practice law" (*id.* at 246-247).[24]

CONCLUSION

The courts below relied on Mooney's speculative estimate to determine the issue (decisive under federal law) of how much strike absence was involuntary. "No case has been cited and none has been found in which inference, however expert, has been permitted to make so broad a leap * * *" (*Galloway* v. *United States,* 319 U.S. 372, 387). This petition for certiorari should be granted.

Respectfully submitted,

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[24] We are aware that the *Schware* case has been vigorously criticized, Rehnquist, *The Bar Admission Cases: A Strange Judicial Aberration,* 44 ABAJ 229 (March, 1958), with particular attention to this Court's review of the record, *id.* at 230-231. However, *Schware* was followed in *Thompson* and its method has survived, see e.g., *Vachon, supra,* where this Court made an "independent examination of the trial record" and determined that the only evidence proffered "was in no way probative of the crucial element of the crime * * *" (414 U.S. at 479-480). The Supreme Court of Connecticut was bound by these precedents, and its disregard of them necessitates this Court's consideration.

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

CONSTITUTION OF THE UNITED STATES:

ARTICLE VI

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

AMENDMENT XIV

" * * * or shall any State deprive any person of life, liberty, or property, without due process of law * * * ."

NATIONAL LABOR RELATIONS ACT, as amended:

"Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or potection * * *."

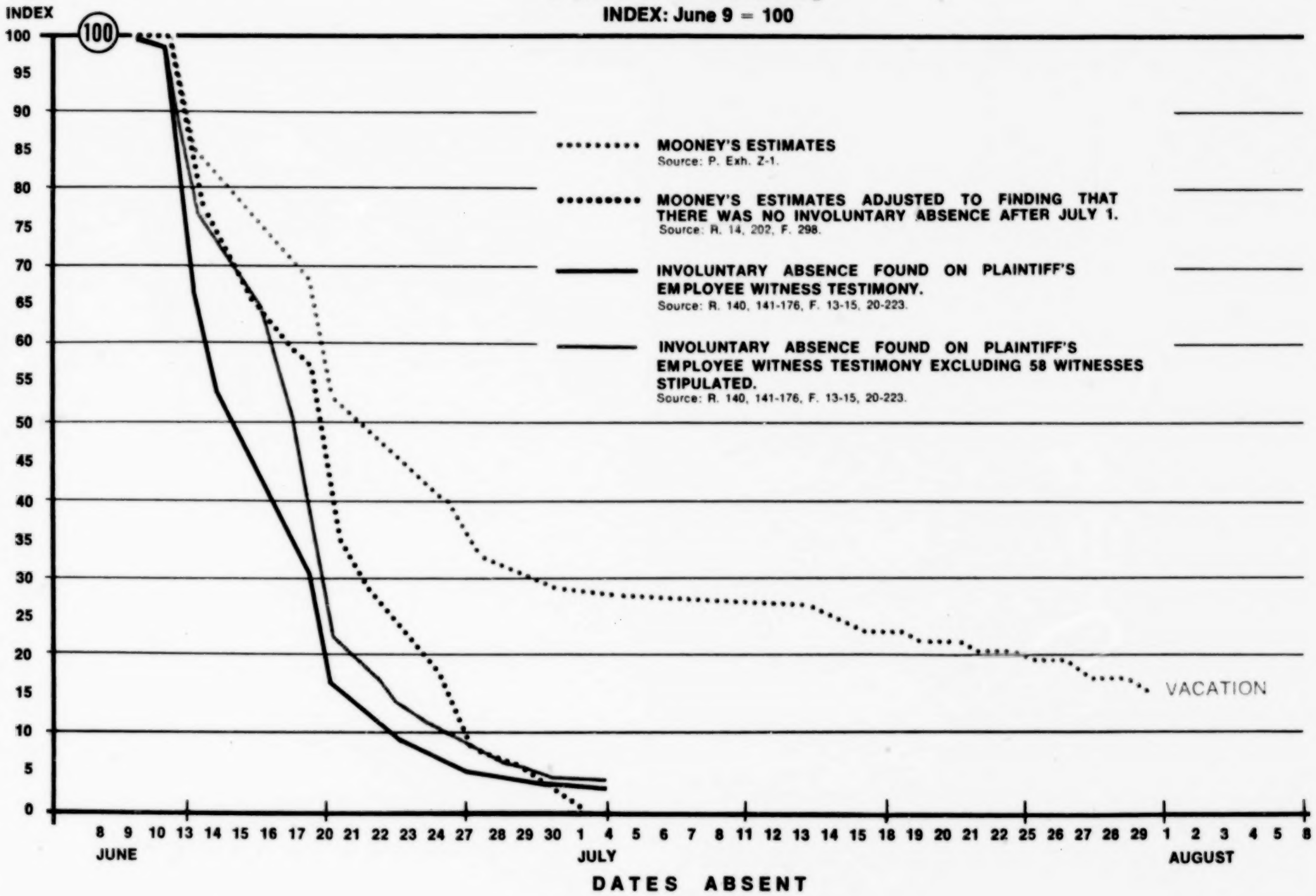
"Sec. 13. Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right."

1

TREND LINES JUNE 9th THROUGH JULY 1st

Pratt and Whitney

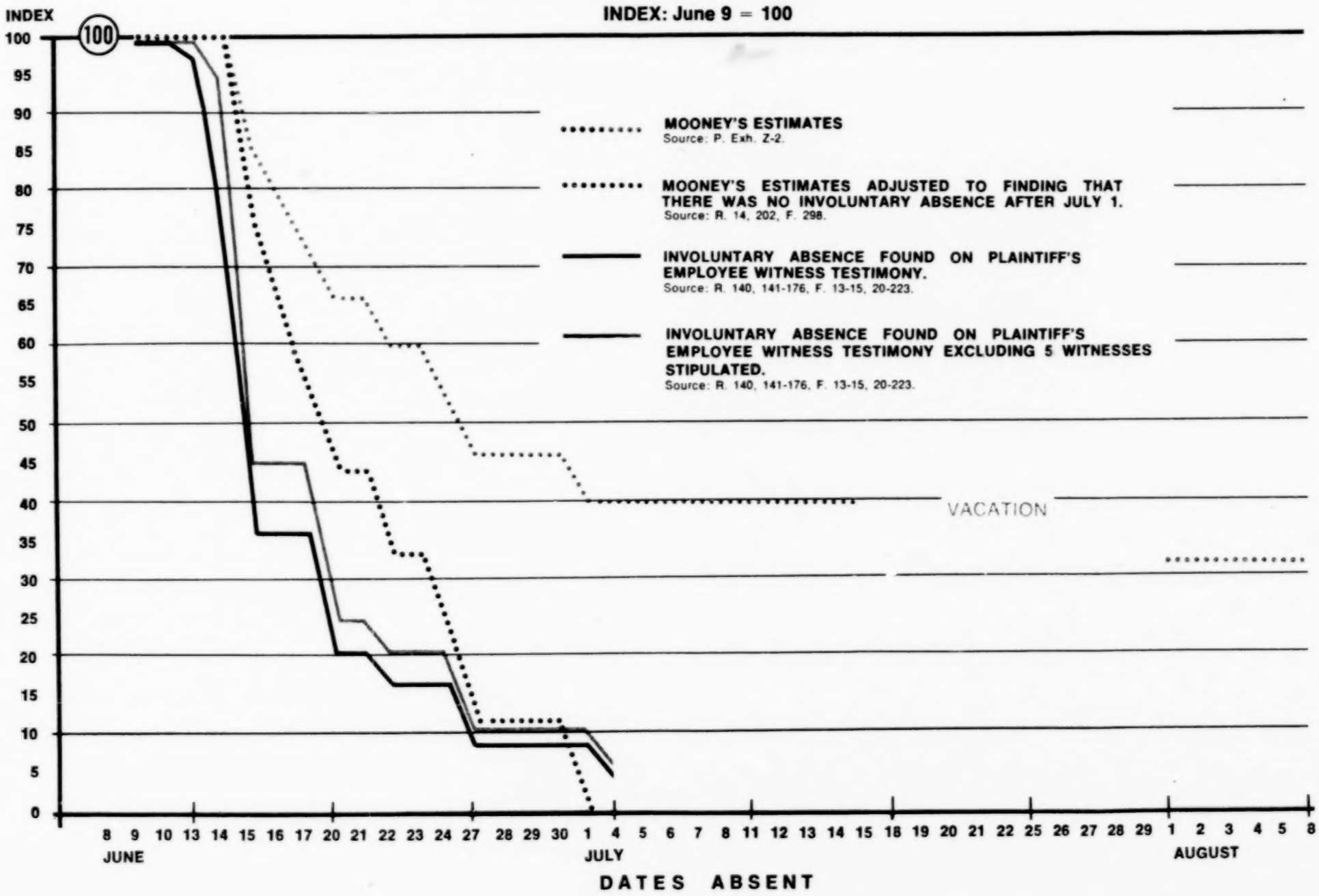
INDEX: June 9 = 100



REFERENCE TABLE 1A -- CHART 1 -- PRATT & WHITNEY
NUMBER AND INDEX OF INVOLUNTARY ABSENCE
JUNE 9th THROUGH JULY 29th

	1		2		3		4		5	
	Mooney's Estimates		Mooney Estimates Adjusted (less 1800)		Involuntary Absence Found (Plaintiff's Employee Witnesses)		Excluding 58 Stipulated Witnesses		Mooney's Adj. Est. Fitted to Index of Employee Witnesses	
June	Number	Index	Number	Index	Number	Index	Number	Index	Number	Index
9	6500	100	4700	100	165	100	113	100	4700	100
10	6500	100	4700	100	162	98.2	112	99.1	4615	98.2
13	5500	84.6	3700	78.7	105	63.6	88	77.9	2989	63.6
14	5200	80.0	3400	72.3	84	50.9	82	72.6	2392	50.9
15	4900	75.4	3100	66.0	75	45.5	75	66.4	2139	45.5
16	4700	72.3	2900	61.7	63	38.2	63	55.8	1795	38.2
17	4500	69.2	2700	57.4	50	30.3	50	44.2	1424	30.3
20	3500	53.8	1700	36.2	27	16.4	27	23.9	771	16.4
21	3200	49.2	1400	29.8	22	13.3	22	19.5	625	13.3
22	3000	46.2	1200	25.5	16	9.7	16	14.2	456	9.7
23	2800	43.1	1000	21.3	13	7.9	13	11.5	371	7.9
24	2600	40.0	800	17.0	11	6.7	11	9.7	315	6.7
27	2200	33.8	400	8.5	8	4.8	8	7.1	226	4.8
28	2100	32.3	300	6.4	7	4.2	7	6.2	197	4.2
29	2000	30.8	200	4.3	5	3.0	5	4.4	141	3.0
30	1900	29.2	100	2.1	4	2.4	4	3.5	113	2.4
July										
1	1800	27.7	0	0	4	2.4	4	3.5	113	2.4
4	1800	27.7	0	0	4	2.4	4	3.5	23,382	
5	1800	27.7								
6	1800	27.7								
7	1800	27.7								
8	1800	27.7								
11	1800	27.7								
12	1700	26.2								
13	1700	26.2								
14	1600	24.6								
15	1500	23.1								
18	1500	23.1								
19	1400	21.5								
20	1400	21.5								
21	1300	20.0								
22	1300	20.0								
25	1200	18.5								
26	1200	18.5								
27	1100	16.9								
28	1100	16.9								
29	1000	15.4								

TREND LINES JUNE 9th THROUGH JULY 1st
Hamilton Standard

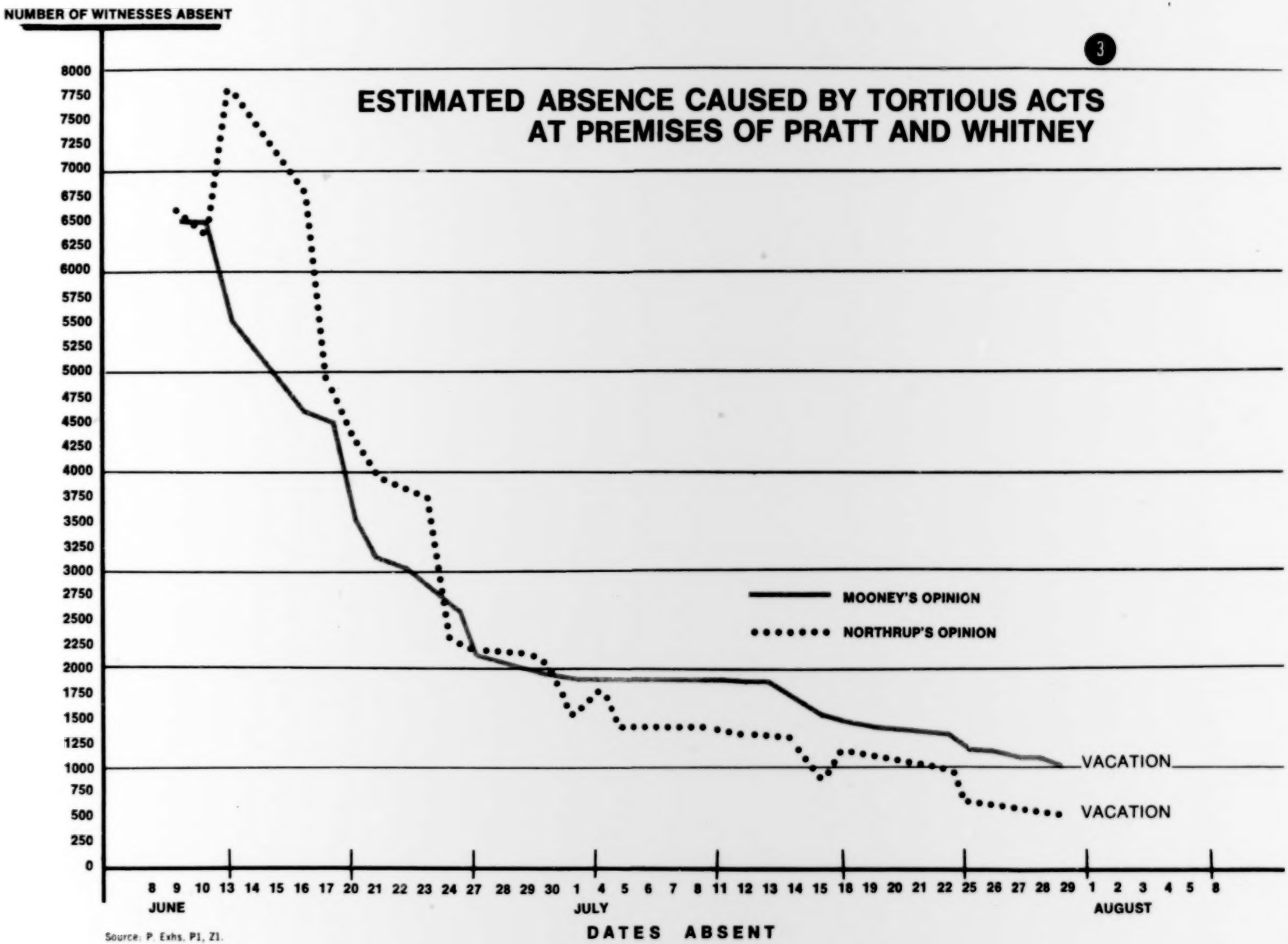


REFERENCE TABLE 2A - CHART 2 - HAMILTON STANDARD
NUMBER AND INDEX OF INVOLUNTARY ABSENCE
JUNE 9 THROUGH AUGUST 8

	1		2		3		4		5	
	Mooney's Estimates		Mooney Estimates Adjusted (600 less)		Involuntary Absence Found (Plaintiff's Employee Witnesses)		Excluding 5 Stipulated Witnesses		Mooney's Adj. Est. Fitted to Index of Employee Witnesses	
June	Number	Index	Number	Index	Number	Index	Number	Index	Number	Index
9	1500	100	900	100	25	100	20	100	900	100
10	1500	100	900	100	25	100	20	100	900	100
13	1500	100	900	100	24	96.0	20	100	864	96
14	1500	100	900	100	20	80.0	19	95	720	80
15	1300	86.7	700	77.8	9	36.0	9	45	324	36
16	1200	80.0	600	66.7	9	36.0	9	45	324	36
17	1100	73.3	500	55.6	9	36.0	9	45	324	36
20	1000	66.7	400	44.4	5	20.0	5	25	180	20
21	1000	66.7	400	44.4	5	20.0	5	25	180	20
22	900	60.0	300	33.3	4	16.0	4	20	144	16
23	900	60.0	300	33.3	4	16.0	4	20	144	16
24	800	53.3	200	22.2	4	16.0	4	20	144	16
27	700	46.7	100	11.1	2	8.0	2	10	72	8
28	700	46.7	100	11.1	2	8.0	2	10	72	8
29	700	46.7	100	11.1	2	8.0	2	10	72	8
30	700	46.7	100	11.1	2	8.0	2	10	72	8
July										
1	600	40.0	0	0	2	8.0	2	10	72	8
4	600	40.0	0	0	1	4.0	1	5	5508	
5	600	40.0								
6	600	40.0								
7	600	40.0								
8	600	40.0								
11	600	40.0								
12	600	40.0								
13	600	40.0								
14	600	40.0								
15	600	40.0								
Aug.										
1	500	33								
2	500	33								
3	500	33								
4	500	33								
5	500	33								
8	500	33								

3

ESTIMATED ABSENCE CAUSED BY TORTIOUS ACTS AT PREMISES OF PRATT AND WHITNEY



Source: P. Exhs. P1, Z1.

TABLE 3-A

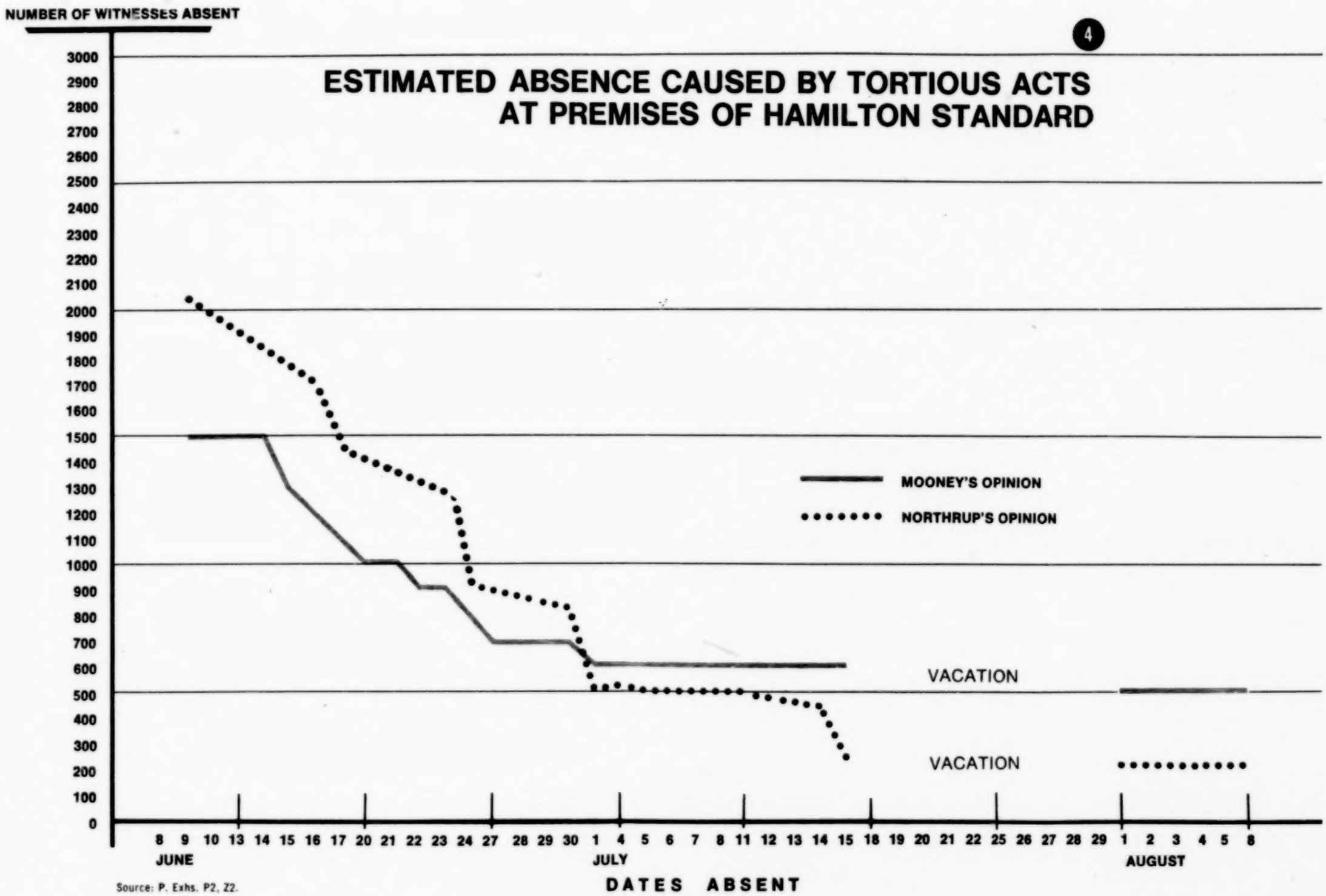
PRATT & WHITNEY

DISCREPANCIES BETWEEN ESTIMATES OF MR. MOONEY AND DR. NORTHRUP

June	Mooney Estimates	Northrup Estimates	Difference	Cost of Difference At $15.57 Per Absence	% of Difference
9	6500	6671	171	$ 2,662.47	3
10	6500	6651	151	2,351.07	2
13	5500	7822	2322	36,153.54	42
14	5200	7578	2378	37,025.46	46
15	4900	7213	2313	36,013.14	47
16	4700	6852	2152	33 506.64	46
17	4500	4905	405	6,305.85	9
20	3500	4328	828	12,891.96	24
21	3200	4075	875	13,623.75	27
22	3000	3890	890	13,857.30	30
23	2800	3717	917	14,277.69	33
24	2600	2373	227	3,534.39	9
27	2200	2218	18	280.26	1
28	2100	2159	59	918.63	3
29	2000	2120	120	1,868.40	6
30	1900	2075	175	2,724.75	9
July 1	1800	1505	295	4,593.15	16
Subtotal (June 9-July 1)			14296	$ 222,588.72	
4	1800	1727	73	1,136.61	4
5	1800	1469	331	5,153.67	23
6	1800	1461	339	5,278.23	23
7	1800	1442	358	5,574.06	25
8	1800	1419	381	5,932.17	27
11	1800	1404	396	6,165.72	28
12	1700	1349	351	5,465.07	26
13	1700	1320	380	5,916.60	29
14	1600	1297	303	4,717.71	23
15	1500	874	626	9,746.82	72
18	1500	1228	272	4,235.04	22
19	1400	1204	196	3,051.72	16
20	1400	1194	206	3,207.42	17
21	1300	1182	118	1,837.26	10
22	1300	1163	137	2,133.09	12
25	1200	636	564	8,781.48	89
26	1200	614	586	9,124.02	95
27	1100	605	495	7,707.15	82
28	1100	598	502	7,816.14	84
29	1000	577	423	6,586.11	73
Subtotal (July 4-29)			7037	$ 109,566.09	
TOTAL			21333	$ 332,154.54	

4

ESTIMATED ABSENCE CAUSED BY TORTIOUS ACTS AT PREMISES OF HAMILTON STANDARD



Source: P. Exhs. P2, Z2.

TABLE 4-A

HAMILTON STANDARD

DISCREPANCIES BETWEEN ESTIMATES OF MR. MOONEY AND DR. NORTHRUP

	Mooney Estimates	Northrup Estimates	Difference	Cost of Difference At $25.27 Per Absence	% of Difference
June					
9	1500	2030	530	$ 13,393.10	35
10	1500	1993	493	12,458.11	33
13	1500	1914	414	10,461.78	28
14	1500	1876	376	9,501.52	25
15	1300	1790	490	12,382.30	38
16	1200	1712	512	12,938.24	43
17	1100	1499	399	10,082.73	36
20	1000	1414	414	10,461.78	41
21	1000	1385	385	9,728.95	39
22	900	1329	429	10,840.83	48
23	900	1305	405	10,234.35	45
24	800	957	157	3,967.39	20
27	700	904	204	5,155.08	29
28	700	888	188	4,750.76	27
29	700	871	171	4,321.17	24
30	700	858	158	3,992.66	23
July					
1	600	508	92	2,324.84	15
Subtotal (June 9- July 1)			5817	$ 146,995.59	
4	600	523	77	1,945.79	15
5	600	507	93	2,350.11	18
6	600	506	94	2,375.38	19
7	600	502	98	2,476.46	20
8	600	501	99	2,501.73	20
11	600	500	100	2,527.00	20
12	600	487	113	2,855.51	23
13	600	471	129	3,259.83	27
14	600	457	143	3,613.61	31
15	600	221	379	9,577.33	171
August					
1	500	218	282	7,126.14	129
2	500	216	284	7,176.68	131
3	500	211	289	7,303.03	137
4	500	208	292	7,378.84	140
5	500	205	295	7,454.65	144
8	500	200	300	7,581.00	150
Subtotal (July 4- Aug. 8)			3067	$ 77,503.09	
TOTAL			8884	$ 224,498.68	

Supreme Court, U. S.
FILED
MAR 5 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1263

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS (AFL-CIO), ET AL., *Petitioners,*

v.

UNITED AIRCRAFT CORPORATION, *Respondent.*

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CONNECTICUT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No.

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS (AFL-CIO), ET AL., *Petitioners,*

v.

UNITED AIRCRAFT CORPORATION, *Respondent.*

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CONNECTICUT

Memorandum of Decision on Demurrer of Plaintiff to Plea in Abatement of Defendants

(Pastore, J.)

(January 9, 1964)

SUPERIOR COURT
HARTFORD COUNTY

No. 133884

UNITED AIRCRAFT CORPORATION, *Petitioner*,

v.

INTERNATIONAL ASSOCIATION OF MACHINISTS: AERONAUTICAL INDUSTRIAL DISTRICT LODGE No. 91, IAM; INDUSTRIAL AIRCRAFT LODGE 1746, IAM, *Respondent*.

Memorandum of Decision on Demurrer of Plaintiff to Plea in Abatement of Defendants

The matter before the court presently is the demurrer of plaintiff to the plea in abatement of defendants to the substitute complaint of plaintiffs. In the substitute complaint, plaintiff pleads in two counts. In the first it seeks damages for claimed injuries sustained by it by alleged violence and misconduct of defendants engaged in during a strike at plaintiff's plants in East Hartford and Manchester in 1960. In the second count, it pleads that the allegedly offending acts mentioned in the previous count were engaged in by the defendants as a result of a conspiracy.

Defendants' plea in abatement is based upon three grounds. The first is that the filing of the substitute complaint (hereinafter referred to as the complaint) constitutes an unfair labor practice under § 8 of the National Labor Relations Act, as amended, 65 Stat. 601, 29 U.S.C.A. § 158. The gist of the second ground is that the scope of the allegations of the complaint comprehend not only a claim for damages for claimed illegal activity of defendants, but also for injuries necessarily resulting from concerted action of defendants which is protected by the Act

and as such pre-empted from state jurisdiction. The third ground is that the invocation of the "conspiracy doctrine" in the second count of the complaint constitutes an additional unfair labor practice.

By reference the exhibits attached to the plea in abatement to the original complaint are considered attached to and made part of the present plea in abatement to the substitute complaint. Furthermore, the court considers that such exhibit to the instant plea refers to the charge made by defendant Lodge 1746, I.A.M., instead of that of Lodge (Local) 743, I.A.M. By such exhibits the plea in abatement shows that on or about May 29, 1963, charges were made to the Regional Director of the N.I.L.R.B. in behalf of one or more of defendants alleging against plaintiff, in addition to charges already previously made, the bringing of the instant action for damages to be an unfair labor practice within the meaning of said § 8a()(1) and (3)(5) of said Act.

The demurrer of plaintiff to the plea in abatement is upon several grounds, as therein is more fully set forth.

From a fair reading of the allegations of the complaint, the facts concerning which damages are claimed relate to claimed acts of violence, mass picketing and other tortious conduct of defendants in relation to strike activities of a type and nature as to which the power of the state and state courts to grant relief by way of damages has not been pre-empted by the National Labor Relations Act. *United Construction Workers* v. *Laburnum Corp.*, (1954) 347 U.S. 656; *United Auto Workers* v. *Russell,* (1958) 356 U.S. 634; *Lavery's Main Street Grill, Inc.* v. *Hotel Employees Union,* (1959) 146 Conn. 93. As matter of law, the mere fact that the illegal conduct is also an unfair labor practice does not defeat the state jurisdiction. *United Construction Workers* v. *Laburnum,* supra, 660-661; *United Auto Workers* v. *Russell,* supra, 637; *Lavery's*

Main Street Grill, Inc. v. *Hotel Employees Union,* supra, 101-102.

In *Clyde Taylor Company,* 127 N.L.R. Board 103 (April 11, 1960) Taylor obtained an injunction in a state court banning peaceful picketing resorted to by the Union in protest against the discharge of employees, including a union steward. The state court had no jurisdiction to issue the injunction. Recognizing the right of all persons in good faith to protect their property and to litigate their claims in court, so long as the motivation was not a desire to defeat union organization of employees, a legitimate purpose of the Act, the National Labor Relations Board ordered dismissed the complaint which charged a violation of § 8(a)(1) of the Act for having obtained in a state court an injunction banning the picketing. Three members of the Board were of the opinion there had been no violation of said Section 8(a)(1) of the Act because of the good faith of Taylor in litigating his own rights; one member was of the opinion that there had been an unfair labor practice in obtaining the state injunction but that since it was not in bad faith and the motive was not to defeat union organization the complaint should be dismissed. It would appear from this Board ruling that the mere filing of the complaint in the present action for damages would not be considered as in violation of the Act.

Also since a demurrer does not admit conclusions, it does not admit that the filing of the complaint here is an unfair labor practice. *Smith* v. *Furness,* 117 Conn. 97, 99.

In defendants' memorandum of December 6, 1963, they request the court to take judicial notice of the claimed fact that the General Counsel of the N.L.R. Board has issued a complaint charging that plaintiff has committed an unfair labor practice by filing this damage suit. Granting that judicial notice may take the place of proof in proper circumstances, the court may not entertain such proof at the present time for the more fundamental reason that the

demurrer must be tested against the allegations to which it is directed including such proof as is properly admissible under them consistent with the rules of evidence. *Tomes* v. *Thompson,* 112 Conn. 190, 198; *Cashman* v. *Meriden Hospital,* 117 Conn. 585, 586; *O'Donnell* v. *Sargent & Company,* 69 Conn. 476.

If the proposition is granted that if such a complaint in behalf of the National Labor Relations Board has been issued, such assertion of jurisdiction by the Board would be sufficient to establish an "arguable" case in favor of initial Board jurisdiction (cf. *Marine Engineers* v. *Interlake Company,* 370 U.S. 173, 182, note 16 (1962)), it would be of no avail for there is no allegation of such fact in the plea in abatement to make it admissible. If it be assumed that such action of the N.L.R.B. General Counsel did not occur until after the filing of defendants' plea, it does not alter the situation as to its inadmissibility under present circumstances; its use must await further procedural avenues or remedies to make its interdictory effect felt.

It is difficult to understand why the fact that the scope of the averments of the complaint of plaintiff may be broad enough to include activities of defendants coming under the protection of the N.L.R.B. does or should operate automatically to pre-empt the power of the state court to adjudicate an action otherwise properly within its jurisdiction. The objection of defendants would seem more properly to present a question of the sufficiency of the stated cause of action, a matter not now before this court under the plea in abatement, and to present a problem of the admissibility of evidence on trial under appropriately framed issues.

Moreover, to concede the pre-emptive jurisdictional proposition of defendants, either because of the mere filing of plaintiff's complaint for damages, or because of the filing by defendants with the N.L.R. Board of charges against plaintiffs of committing an unfair labor practice in bringing the action, could lead to strange and unjust results.

It would be tantamount to allowing defendants, permanently or temporarily for an uncertain length of time, even beyond the limitations period perhaps, as has been stated, an immunity from liability for their tortious action gained at the expense of cutting off, or unduly delaying an injured party from his right to recover damages for his property, without recourse or compensation, to an extent which the United States Supreme Court has so far refused to decree, and which no declaration of congressional policy yet supports. *United Construction Workers* v. *Laburnum,* supra, 664; *United Auto Workers* v. *Russell,* supra, 646.

The third ground of abatement, connected with the second count, is that the invocation of the "conspiracy doctrine" constitutes an additional unfair labor practice. This claim is predicated on the fact that the allegations of the complaint in this respect also cover injuries to plaintiff necessarily resulting from activities protected under the Act. The averments of the complaint clearly direct the conspiracy claim to the claimed violence, mass picketing and other stated illegal conduct of defendants. There is no more reason for divesting the state court of jurisdiction which it has because of this dual aspect than there is in regard to the filing of the complaint.

The demurrer of plaintiff is sustained as to all grounds of the defendants' plea in abatement, viz., as to the first and third grounds of abatement, for the reason that said plea fails to show that the filing of the complaint for damages in the instant case is an unfair labor practice, and even assuming it were such, that fact alone would not operate to pre-empt state court jurisdiction in the instant matter; and as to the second ground of abatement for the reason that, so far as the plea in abatement shows, this court does have jurisdiction of the cause stated in the complaint which seeks damages attributable only to the unlawful conduct of defendants.

An order may enter accordingly.

Memorandum of Decision on Demurrer of Plaintiff to Plea in Abatement of Defendants

(Pastore, J.)

(January 9, 1964)

SUPERIOR COURT
HARTFORD COUNTY

No. 133885

UNITED AIRCRAFT CORPORATION, *Petitioner*,

v.

INTERNATIONAL ASSOCIATION OF MACHINISTS: AERONAUTICAL INDUSTRIAL DISTRICT LODGE No. 91, IAM; INDUSTRIAL AIRCRAFT LODGE 743, IAM, *Respondent*.

Memorandum of Decision on Demurrer of Plaintiff to Plea in Abatement of Defendants

The matter before the court presently is the demurrer of plaintiff to the plea in abatement of defendants to the substitute complaint of plaintiffs. In the substitute complaint, plaintiff pleads in two counts. In the first it seeks damages for claimed injuries sustained by it by alleged violence and misconduct of defendants engaged in during a strike at plaintiff's plants at Windsor Locks and Broad Brook, Connecticut, in 1960. In the second count, it pleads that the allegedly offending acts mentioned in the previous count were engaged in by the defendants as a result of a conspiracy.

Defendants' plea in abatement is based upon three grounds. The first is that the filing of the substitute complaint (hereinafter referred to as the complaint) constitutes an unfair labor practice under § 8 of the National Labor Relations Act, as amended, 65 Stat. 601, 29 U.S.C.A. § 158. The gist of the second ground is that the scope of the allegations of the complaint comprehend not only a claim for damages for claimed illegal activity of defendants, but also for injuries necessarily resulting from concerted action of defendants which is protected by the Act

and as such pre-empted from state jurisdiction. The third ground is that the invocation of the "conspiracy doctrine" in the second count of the complaint constitutes an additional unfair labor practice.

By attached exhibits the plea in abatement shows that on or about May 29, 1963, charges were made to the Regional Director of the N.L.R.B. in behalf of one or more of defendants alleging against plaintiff, in addition to charges already previously made, the bringing of the instant action for damages to be an unfair labor practice within the meaning of said § 8(a)(1) and (3)(5) of said Act.

The demurrer of plaintiff to the plea in abatement is upon several grounds, as therein is more fully set forth.

From a fair reading of the allegations of the complaint, the facts concerning which damages are claimed relate to claimed acts of violence, mass picketing and other tortious conduct of defendants in relation to strike activities of a type and nature as to which the power of the state and state courts to grant relief by way of damages has not been pre-empted by the National Labor Relations Act. *United Construction Workers* v. *Laburnum Corp.*, (1954) 347 U.S. 656; *United Auto Workers* v. *Russell*, (1958) 356 U.S. 634; *Lavery's Main Street Grill, Inc.* v. *Hotel Employees Union*, (1959) 146 Conn. 93. As matter of law, the mere fact that the illegal conduct is also an unfair labor practice does not defeat the state jurisdiction. *United Construction Workers* v. *Laburnum*, supra, 660-661; *United Auto Workers* v. *Russell*, supra, 637; *Lavery's Main Street Grill, Inc.* v. *Hotel Employees Union*, supra, 101-102.

In *Clyde Taylor Company*, 127 N.L.R. Board 103 (April 11, 1960) Taylor obtained an injunction in a state court banning peaceful picketing resorted to by the Union in protest against the discharge of employees, including a union steward. The state court had no jurisdiction to issue

the injunction. Recognizing the right of all persons in good faith to protect their property and to litigate their claims in court, so long as the motivation was not a desire to defeat union organization of employees, a legitimate purpose of the Act, the National Labor Relations Board ordered dismissed the complaint which charged a violation of § 8(a)(1) of the Act for having obtained in a state court an injunction banning the picketing. Three members of the Board were of the opinion there had been no violation of said Section 8(a)(1) of the Act because of the good faith of Taylor in litigating his own rights; one member was of the opinion that there had been an unfair labor practice in obtaining the state injunction but that since it was not in bad faith and the motive was not to defeat union organization the complaint should be dismissed. It would appear from this Board ruling that the mere filing of the complaint in the present action for damages would not be considered as in violation of the Act.

Also since a demurrer does not admit conclusions, it does not admit that the filing of the complaint here is an unfair labor practice. *Smith* v. *Furness,* 117 Conn. 97, 99.

In defendants' memorandum of December 6, 1963, they request the court to take judicial notice of the claimed fact that the General Counsel of the N.L.R. Board has issued a complaint charging that plaintiff has committed an unfair labor practice by filing this damage suit. Granting that judicial notice may take the place of proof in proper circumstances, the court may not entertain such proof at the present time for the more fundamental reason that the demurrer must be tested against the allegations to which it is directed including such proof as is properly admissible under them consistent with the rules of evidence. *Tomes* v. *Thompson,* 112 Conn. 190, 198; *Cashman* v. *Meriden Hospital,* 117 Conn. 585, 586; *O'Donnell* v. *Sargent & Company,* 69 Conn. 476.

If the proposition is granted that if such a complaint in behalf of the National Labor Relations Board has been issued, such assertion of jurisdiction by the Board would be sufficient to establish an "arguable" case in favor of initial Board jurisdiction (cf. *Marine Engineers* v. *Interlake Company,* 370 U.S. 173, 182, note 16 (1962)), it would be of no avail for there is no allegation of such fact in the plea in abatement to make it admissible. If it be assumed that such action of the N.L.R.B. General Counsel did not occur until after the filing of defendants' plea, it does not alter the situation as to its inadmissibility under present circumstances; its use must await further procedural avenues or remedies to make its interdictory effect felt.

It is difficult to understand why the fact that the scope of the averments of the complaint of plaintiff may be broad enough to include activities of defendants coming under the protection of the N.L.R.B. does or should operate automatically to pre-empt the power of the state court to adjudicate an action otherwise properly within its jurisdiction. The objection of defendants would seem more properly to present a question of the sufficiency of the stated cause of action, a matter not now before this court under the plea in abatement, and to present a problem of the admissibility of evidence on trial under appropriately framed issues.

Moreover, to concede the pre-emptive jurisdictional proposition of defendants, either because of the mere filing of plaintiff's complaint for damages, or because of the filing by defendants with the N.L.R. Board of charges against plaintiffs of committing an unfair labor practice in bringing the action, could lead to strange and unjust results. It would be tantamount to allowing defendants, permanently or temporarily for an uncertain length of time, even beyond the limitations period perhaps, as has been stated, an immunity from liability for their tortious action

gained at the expense of cutting off, or unduly delaying an injured party from his right to recover damages for his property, without recourse or compensation, to an extent which the United States Supreme Court has so far refused to decree, and which no declaration of congressional policy yet supports. *United Construction Workers* v. *Laburnum*, supra, 664; *United Auto Workers* v. *Russell*, supra, 646.

The third ground of abatement, connected with the second count, is that the invocation of the "conspiracy doctrine" constitutes an additional unfair labor practice. This claim is predicated on the fact that the allegations of the complaint in this respect also cover injuries to plaintiff necessarily resulting from activities protected under the Act. The averments of the complaint clearly direct the conspiracy claim to the claimed violence, mass picketing and other stated illegal conduct of defendants. There is no more reason for divesting the state court of jurisdiction which it has because of this dual aspect than there is in regard to the filing of the complaint.

The demurrer of plaintiff is sustained as to all grounds of the defendants' plea in abatement, viz., as to the first and third grounds of abatement, for the reason that said plea fails to show that the filing of the complaint for damages in the instant case is an unfair labor practice, and even assuming it were such, that fact alone would not operate to pre-empt state court jurisdiction in the instant matter; and as to the second ground of abatement for the reason that, so far as the plea in abatement shows, this court does have jurisdiction of the cause stated in the complaint which seeks damages attributable only to the unlawful conduct of defendants.

An order may enter accordingly.

Memorandum of Decision on Plaintiff's Demurrer to Defendants' Amended Plea in Abatement to Substituted Complaint

(House, J.)

(February 21, 1964)

SUPERIOR COURT
HARTFORD COUNTY

No. 133884

UNITED AIRCRAFT CORPORATION, *Petitioner,*

v.

INTERNATIONAL ASSOCIATION OF MACHINISTS: AERONAUTICAL INDUSTRIAL DISTRICT LODGE No. 91, IAM; INDUSTRIAL AIRCRAFT LODGE 1746, IAM, *Respondent.*

No. 133885

UNITED AIRCRAFT CORPORATION, *Petitioner,*

v.

INTERNATIONAL ASSOCIATION OF MACHINISTS: AERONAUTICAL INDUSTRIAL DISTRICT LODGE No. 91, IAM; INDUSTRIAL AIRCRAFT LODGE 743, IAM, *Respondent.*

Memorandum of Decision on Plaintiff's Demurrer to Defendants' Amended Plea in Abatement to Substituted Complaint

These are companion cases in which the pleadings are identical in substance and except insofar as some factual allegations may differ in respects in no way affecting the questions of law raised by the pleadings pesently under consideration. Accordingly, but one Memorandum of Decision is being prepared to be filed in both cases.

The plaintiff's substituted complaint is in two counts. In brief, the first count alleges that the defendant unions engaged in a strike at the plaintiff's plants during which the unions and their members engaged in illegal and unlawful actions which constituted an unlawful interference

with the plaintiff's business and caused the plaintiff to incur expense for damage to property and to protect its lawful interests. The second count alleges that the alleged illegal acts specified in the first count were done in conspiracy with another union and others.

To this substituted complaint the defendants pleaded in abatement that the court lacked jurisdiction over the subject matter contained in the substituted complaint. The plaintiff filed a motion to erase the plea in abatement for want of jurisdiction over the subject matter of the plea and this motion was denied. Thereupon the plaintiff demurred to the defendants' plea in abatement on nine grounds and this demurrer to the plea in abatement was sustained on all grounds in a lengthy, well reasoned opinion by Pastore, J.

Subsequently the defendants filed an "Amended Plea in Abatement to Substituted Compaint" and to this pleading the plaintiff has demurred. The sufficiency of that demurrer is the present matter for determination by the court.

The amended plea in abatement to the substituted complaint, it is noted, is verbatim the same as the original plea in abatement to the substituted complaint except that whereas the original plea in abatement to the substituted complaint attempted to incorporate by reference an earlier plea in abatement filed June 3, 1963 by defendants to the original complaint together with exhibits attached thereto, the present amended plea in abatement to the substituted complaint not only recites that it incorporates by reference the entire June 3, 1963 original plea in abatement to the original complaint together with the exhibits thereto attached, but further and in addition incorporates by reference into the present plea as defendants' Exhibit 1 a copy of a "Motion for Leave to Withdraw Motion to Consolidate Cases and to further Amend Complaint dated August 13, 1963, and to File Substitute Motion together with Appendix attached thereto" dated August 30,

1963 and filed by Counsel for the General Counsel, National Labor Relations Board, First Region in Cases No. 1-CA-3355 et al before The National Labor Relations Board, First Region (which latter motion, incidentally, expressly incorporates by reference all the allegations of the original complaint which it seeks to amend and supplement but which has not been filed or made an exhibit in these proceedings).

In other words, the amended plea in abatement to the substituted complaint which is the subject of the present demurrer purports to incorporate by reference within its allegations not only (a) an earlier superseded plea in abatement with the exhibits attached thereto, but (b) a motion to amend a complaint filed in a proceeding before the National Labor Relations Board which, in turn, (c) incorporates by reference all the allegations of the original complaint in that proceeding—which original complaint is neither attached nor filed nor made an exhibit.

The result is, obviously, confusion worse confounded! It is difficult to find any part of the defendants' pleading which follows the most elemental rules of Connecticut Practice and Procedure. In fact, even to file the present amended plea in abatement without the consent of the plaintiff or after a motion for leave to file it had been filed and granted by this court was improper pleading. Practice Book, Sec. 132. See *Mitchell* v. *Smith*, 74 Conn. 125; *Brockett* v. *Fair Haven & W. R. Co. et al*, 73 Conn. 428; Hazel Cole's Appeal from Probate, 18 Conn. Sup. 167, 168.

"Rules of pleading are not made for the purpose of tripping up the unknowing or unwary. They are designed to clarify and fix the issues and to confine the judicial inquiry necessary to decide the issues within reasonable and relevant limits. . . ." *Salem Park, Inc.* v. *Salem*, 149 Conn. 141, 144. "Pleadings have their place in our system of jurisprudence. While they are not held to the strict and artificial standard that once prevailed, we still

cling to the belief, even in these iconoclastic days, that no orderly administration of justice is possible without them." *Malone* v. *Steinberg,* 138 Conn. 718, 721. "Pleadings should be direct, precise and specific . . . The court should not have to mathematically dissert the pleadings in order to understand them. The forms of pleadings and the rules governing their use are to be found in the Practice Book. Since 1879 it has served its purpose, occasional changes being adopted as the need is demonstrated . . . Innovations should not be put into practice ex parte by counsel." *Vigue* v. *John Hancock Mutual Life Ins. Co.,* 147 Conn. 305, 306.

Even without its attempted incorporation by reference of undisclosed matter incorporated by reference, the present plea in abatement to the substituted complaint utterly and completely fails to comply with the basic and first requirement of pleading in this jurisdiction. This is set out in Sec. 70 of the Practice Book and Sec. 52-98 of the General Statutes:

> "Each pleading shall contain a plan and concise statement of the material facts on which the pleader relies, but not of the evidence by which they are to be proved, such statement to be divided into paragraphs numbered consecutively, each containing as nearly as may be a separate allegation."

The defendants' present amended plea in abatement to the substituted complaint is anything but "a plain and concise statement of the material facts on which the pleader relies." It improperly attempts to incorporate within it evidence by which the material facts are sought to be proved. It is not "divided into paragraphs numbered consecutively, each containing as nearly as may be a separate allegation." In fact, it does not appear that there has even been an attempt by the defendants to comply with Sec. 70 of the Practice Book and Sec. 52-98 of the General Statutes.

Nor is the court powerless to compel compliance with the basic rules for proper pleading when there is such a gross disregard for them. Section 52-119 of the General Statutes expressly provides "Parties failing to plead according to the rules and orders of the court may be nonsuited or defaulted, as the case may be."

However, rather than attack the gross deficiencies of the defendants' plea, the plaintiff has demurred to it, thus presenting the question as to whether this amended plea in abatement has cured the insufficiencies of the prior plea as to which this court by Pastore, J. sustained plaintiff's demurrer. "Under these circumstances the court, in the interest of economy of judicial procedure, although rather against its better judgment, has decided to take the case as presented by the parties." *Swainbank* v. *Coombs,* 19 Conn. Sup. 391, 394.

As already noted, the only change in the present amended plea in abatement from the prior plea as to which the plaintiff's demurrer was sustained is in the additional language in the first and second paragraphs of the amended plea which incorporates into the plea as defendants' Exhibit 1 a document entitled "Motion for Leave to Withdraw Motion to Consolidate Cases and to Further Amend Complaint, dated August 13, 1963, and to File Substitute Motion together with Appendix A attached thereto." So the narrow issue now before the court is whether this added allegation cures the defects for which this court has already sustained a demurrer.

Before a consideration of the merits of this issue are discussed two matters should be noted:

a) the defendants did not comply with the requirements of Sec. 91, paragraph 2 of the Practice Book with respect to serving and filing the Exhibit 1 referred to in the amended plea in abatement which, instead of being served and filed, was marked as an Exhibit for Identification.

b) Exhibit 1 referred to in the plea (marked as Exhibit 1 for identification at the hearing) is not a complete document in that it is entitled "Motion for Leave to Withdraw Motion to Consolidate Cases and to Further Amend Complaint, dated August 13, 1963, and to File Substitute Motion together with Appendix A attached thereto." Attached to this motion in the exhibit is a form entitled "First Amended Charge Against Employer" dated June 10, 1963 which states that "The charging party re-alleges and incorporates herein by reference all allegations of the original charge (initially filed as Fourteenth Amended Charge)." There is also attached a form entitled "Charge Against Employer" dated June 6, 1963 which states that "The charging party hereby realleges and incorporates herein by reference all allegations of the Thirteenth Amended Charge filed April 15, 1963."

Nowhere on the exhibit does it appear, nor has it been alleged or shown, whether or not the "Motion for Leave to Withdraw Motion to Consolidate Cases and to Further Amend Complaint dated August 13, 1963" was granted or denied, nor does it anywhere appear nor has it been alleged or shown whether or not the "Motion to File Substitute Motion Together with Appendix A attached thereto" has been granted or denied. Nor has this court been in any way apprised of what was purportedly "re-alleged" and incorporated by reference in the "Charges against Employer" stated in Exhibit 1.

This court can hardly be expected to evaluate the effect of a document, the contents of which are not disclosed, or of a copy of motions filed in another matter when it has no knowledge whether the motions were granted or denied!

In addition, it does not appear that the pleading of the Exhibit 1 cures the defects in the amended plea in abatement as noted by this court in sustaining the demurrer to the original plea in abatement. The defendants' failure adequately to plead over after the sustaining of the demurrer leaves this court with no other course than to render judgment for the plaintiff on the present demurrer which is on the same grounds as that previously sustained. *Leger* v. *Kelley,* 142 Conn. 585, 587; *Cashman* v. *Meriden Hospital,* 117 Conn. 585, 589.

The only possible relevancy of the only added allegation with regard to Exhibit 1 referred to in the present plea is with respect to the allegation that plaintiff's action in filing the complaint in this action was an unfair labor practice. That same allegation was made in the original plea in abatement and this court by Pastore, J. sustained the demurrer addressed to it. The concluding language of his Memorandum of Decision dated January 8, 1964 is clear and precise:

> "The demurrer of plaintiff is sustained as to all grounds of the defendants' plea in abatement, viz., as to the first and third grounds of abatement, for the reason that said plea fails to show that the filing of the complaint for damages in the instant case is an unfair labor practice, and even assuming it were such, that fact alone would not operate to pre-empt state court jurisdiction in the instant matter; and as to the second ground of abatement for the reason that, so far as the plea in abatement shows, this court does have jurisdiction of the cause stated in the complaint which seeks damages attributable only to the unlawful conduct of the defendants."

There is no need to quote further from Judge Pastore's Memorandum of Decision or re-cite the authorities therein cited. It must be held that the defendants' amended plea in abatement does not cure the insufficiencies for which the demurrer to the original plea in abatement was sustained. Accordingly, for the reasons hereinbefore noted and those set forth in the January 8, 1964 Memorandum of Decision of Judge Pastore, the demurer to the amended plea in abatement to the substituted complaint is sustained.

Memorandum Re Defendants' Demurrer to the Relief Sought

(Cotter, J.)

(March 25, 1965)

SUPERIOR COURT
HARTFORD COUNTY

No. 133884

UNITED AIRCRAFT CORPORATION, *Petitioner,*

v.

INTERNATIONAL ASSOCIATION OF MACHINISTS: AERONAUTICAL INDUSTRIAL DISTRICT LODGE No. 91, IAM; INDUSTRIAL AIRCRAFT LODGE 1746, IAM, *Respondent.*

No. 133885

UNITED AIRCRAFT CORPORATION, *Petitioner,*

v.

INTERNATIONAL ASSOCIATION OF MACHINISTS: AERONAUTICAL INDUSTRIAL DISTRICT LODGE No. 91, IAM; INDUSTRIAL AIRCRAFT LODGE 743, IAM, *Respondent.*

In case No. 133884 by virtue of a more specific statement the plaintiff claims damages of $8,710,193.00 and in case No. 133885 in the same manner claims damages of $4,034,070.00.

The plaintiff United Aircraft Corporation seeks to recover damages by reason of acts of violence and misconduct engaged in by the defendant unions during a strike at plaintiff's plants from June 8, 1960 to August 11, 1960. The following has taken place in the case so far: two pleas in abatement claiming that this Court lacked jurisdiction

over the subject matter of the actions were sustained; two motions to stay proceedings were denied; and an action seeking an injunction against the plaintiff in the Federal District Court was denied. *International Association of Machinists* v. *United Aircraft Corporation,* 56 LRRM 2389, 49 CCH Labor Cases P 18,959 (D. Conn. 1964); aff'd, 333 F.2d 367 (2nd Cir. 1964); cert. denied, 379 U.S. 946 (1964).

A motion for more specific statement dated May 7, 1964, seeking in paragraph 8 a more specific statement of plaintiff's claimed damages was granted as modified by Judge Dube and the plaintiff filed its more specific statement on November 13, 1964. The defendants now demur to the relief sought. Reference is apparently made to the plaintiff's substituted complaint dated and filed June 4, 1963, and this memorandum concerns the demurrer as referring to the substituted complaint.

Paragraphs 9, 10, 11, 12 and 14 of the first and second counts of its substituted complaint claim tortious acts during the strike and in paragraph 17 of the first count and paragraph 19 of the second count the plaintiff apparently claims damages by virtue of these acts.

Judge Pastore on January 8, 1964 remarked, in part, in an opinion on this question as follows: "From a fair reading of the allegations of the complaint, the facts concerning which damages are claimed relate to claimed acts of violence, mass picketing and other tortious conduct of defendants in relation to strike activities of a type and nature as to which the power of the state and state courts to grant relief by way of damages has not been preempted by the National Labor Relations Act."

The defendants filed an amended plea in abatement dated January 11, 1964, realleging that plaintiff seeks damages not only for defendants' tortious acts but also for protected strike activities. Judge House, in his memorandum of de-

cision dated February 21, 1964 sustaining the demurrer, quoted Judge Pastore and based his decision in part on the reasons in Judge Pastore's memorandum.

Since the only pleading concerning the matter of damages is plaintiff's more specific statement dated November 12, 1964, filed in compliance with defendants' motion dated May 7, 1964. Paragraph 8 of defendants' motion sought to have paragraph 17 of the first count of plaintiff's substituted complaint and paragraph 19 of the second count made more specific concerning plaintiff's damages. Paragraph 8 of the motion was modified by Judge Dube to require the plaintiff to furnish "an accountant's breakdown, an accountant's report as to what you intend to go after."

Paragraph 8 of plaintiff's more specific statement is an accountant's report, as ordered, and makes more specific paragraph 17 of the first count of plaintiff's substituted complaint and paragraph 19 of the second count, which seem to be plaintiff's claimed injuries resulting from the so-called tortious acts, alleged in paragraphs 9, 10, 11, 12 and 14 of the substituted complaint. The plaintiff can only claim damages for tortious acts, as Judge Pastore and Judge House decided.

The plaintiff admits it cannot recover damages for losses caused by protected strike activities and agreed in oral argument that it claims damages only for illegal conduct.

Clearly, at the time of trial, the plaintiff can only introduce evidence to show illegal and tortious conduct so that the defendant can in no way be harmed.

The extent of state court jurisdiction in a common law tort action arising out of a labor dispute has been clearly defined by the Supreme Court of the United States.

Peaceful activity is not subject to state decree or regulation either by an award of damages or by injunctive relief.

The jurisdiction left in the state courts relative to granting damages exists in cases where violent torts are involved. Federal law requires that relief in the form of monetary damages must be restricted to the results of alleged violent torts. *San Diego Building Trades Council* v. *Garmon,* 359 U.S. 236, 43 LRRM 2838. Damages, of course must be separated and apart from economic losses resulting from lawful conduct during a legal strike because the state courts do not have jurisdiction to award damages which might be due to lawful and legal activities. *Local 20 Teamsters* v. *Morton,* 377 U.S. 252, 56 LRRM 2225.

A demurrer to the relief sought raises the question of the kind of relief sought, such as injunction, declaratory judgment, and damages, not whether a particular element of damages is compensable. *Seidler* v. *Burns,* 84 Conn. 111, 113 (1911); *Urban* v. *Hartford Gas Co.,* 139 Conn. 301, 304 (1952); *Wexler Construction Co.* v. *Housing Authority of Norwich,* 144 Conn. 187, 192 (1956).

The defendants' demurrer to the relief sought seems to claim that an alleged element of plaintiff's damage claim is not compensable.

Defendants' demurrer to the relief sought is overruled.

Memorandum of Decision on Plaintiff's Demurrer to Defendants' First, Second, Third, Sixth and Seventh Special Defenses to First and Second Counts of Substituted Complaint

(Parskey, J.)

(March 14, 1966)

SUPERIOR COURT
HARTFORD COUNTY

No. 133884

UNITED AIRCRAFT CORPORATION, *Petitioner,*

v.

INTERNATIONAL ASSOCIATION OF MACHINISTS: AERONAUTICAL INDUSTRIAL DISTRICT LODGE NO. 91, IAM; INDUSTRIAL AIRCRAFT LODGE 1746, IAM, *Respondent.*

No. 133885

UNITED AIRCRAFT CORPORATION, *Petitioner,*

v.

INTERNATIONAL ASSOCIATION OF MACHINISTS: AERONAUTICAL INDUSTRIAL DISTRICT LODGE NO. 91, IAM; INDUSTRIAL AIRCRAFT LODGE 743, IAM, *Respondent.*

In their first, second and third special defenses to both counts the defendants raise again the jurisdictional issue of federal pre-emption, this time as a special defense under the authority of *McNish* v. *American Brass Co.*, 1952, 139 Conn. 44, 50. The first special defense alleges that the in-

stitution of the present actions constitutes arguably an unfair labor practice in violation of Section 8(a) (1) of the Labor Management Relations Act, 1947 (the Taft Hartley Act). The second special defense alleges that the relief which the plaintiff seeks covers all strike losses without differentiating losses resulting from peaceful primary strike activity protected by the Taft Hartley Act and losses resulting from tortious misconduct and because of the inclusion of arguably protected activity the pre-emption doctrine applies. The third special defense claims that the plaintiff by invoking the conspiracy violates rights protected by Section 7 of the Taft Hartley Act and therefore this court lacks jurisdiction of the subject matter.

The three jurisdictional claims of the defendants' palimpsest, now included by way of special defense, have already been passed upon by the court. The claims in the first and third special defenses were considered by Pastore J. in his memorandum on the defendants' plea in abatement. The jurisdictional claim in the second special defense was considered by Cotter J. with respect to the defendants' demurrer to the relief sought. No new arguments have been advanced which would persuade the court to change its opinion merely because the claims are now clothed in a different garment. With reference to the second special defense it may well be that the plaintiff's actions are merely a disguised effort to compel the defendants to compensate the plaintiff for its strike losses; if this turns out to be the case the court lacks neither the discernment nor the authority to deal with this matter appropriately at the trial. However, the court cannot assume this to be the case at this stage of the proceedings.

In their sixth special defense the defendants make the tridentated claim of waiver, estoppel and laches. The claim of laches, while applicable to suits in equity, does not apply to actions at law. *Weil* v. *Poulsen*, 1936, 121 Conn. 281, 289. With respect to waiver and estoppel the issue is not as

simple as formulated by the plaintiff. "'Waiver' is a vague term used for a great variety of purposes, good and bad, in the law. In any normal sense, however, it cannotes some kind of voluntary knowing relinquishment of a right". *Green* v. *United States,* 1957, 355 U.S. 184, 191. Whether there is an intent to waive is a question of fact. *Chatfield Co.* v. *O'Neill,* 1915, 89 Conn. 172, 175; *O'Loughlin* v. *Poli,* 1909, 82 Conn. 427, 436. It need not be express; it may be implied. *Lee* v. *Casualty Co.,* 1916, 90 Conn. 202, 206. Indeed, when the intent to waive, though not expressly found, is yet the necessary inference from the facts found, the intent may be inferred as a matter of law. *Grippo* v. *Davis,* 1918, 92 Conn. 693, 696. The allegations of this defense are sufficient to warrant the inference of waiver and therefore can be considered even in the absence of an express allegation. *Phoenix Mutual Life Insurance Co.* v. *Brenckman,* 1961, 148 Conn. 391, 395. As for estoppel, although it is generally stated that in order for the doctrine to apply the party must do or say something intended or calculated to induce another to believe in the existence of certain facts and to act upon that belief and the other party influenced thereby must actually change his position or do some act to his injury which he otherwise would not have done, *Pet Car Products, Inc.* v. *Barnett,* 1962, 150 Conn. 42, 53, it should not be overlooked that "the principal of estoppel . . . has its foundation in a wise and salutary policy. It is a means of repose. It promotes fair dealing. It cannot be made an instrument of wrong or oppression, and it often gives triumph to right and justice where nothing else known to our jurisprudence can, by its operation, secure those ends. Like the Statute of Limitations, it is a conservator, and without it society could not well go on". *Daniels* v. *Tierney,* 1880, 102 U.S. 415, 420. The present action must be examined in the context of the strike which spawned it and the injunction which preceded it. The question presented here is whether when the plaintiff sought an injunction against certain tortious conduct and when there-

after the parties entered into a certain stipulation with respect to the issuance of such injunction without a reservation of right to pursue an action for damages, the plaintiff has elected its course of action and is therefore estopped to pursue its claim for damages. It is clear that a party may claim damages in an injunction proceeding. *Roy* v. *Moore,* 1912, 85 Conn. 159, 161. Furthermore, a court of equity which has obtained jurisdiction of a controversy will retain jurisdiction for the purpose of administering complete relief in furtherance of justice concerning the subject matter. *Clipfel* v. *Kantrowitz,* 1956, 143 Conn. 184, 188. Since he who seeks equity must do equity the question may well be whether under the circumstances surrounding the labor dispute between the parties the court will permit the plaintiff to seek an injunction while at the same time holding in reserve its power play for damages. Without a full plenary hearing of all the circumstances surrounding the injunction and the stipulation entered into in connection therewith the court cannot hold as a matter of law that this defense is invalid.

The seventh special defense raises the defense of the one year statute of limitations under Section 52-584 of the General Statutes. It is the plaintiff's claim that the case at bar is governed by the three year statute. Section 52-577. The plaintiff's argument is two-fold; (1) that it is not seeking damages for injuries to real or personal property, (2) it is not seeking damages based on reckless or wanton misconduct. Since the second ground is dispositive of the present matter there is no need to consider the first ground; consideration of the first ground is best left to another day. As for the latter ground both counts of the substituted complaint claim damages flowing from intentional acts, not from reckless or wanton misconduct. Such acts are not covered by Section 52-584 which is limited to acts of neligence or of reckless and wanton misconduct. The intentional tort is governed by Section 52-577. *City of Milford* v. *Swarbrick,* 1963, 24 Conn. Sup. 320, 323.

Although the defendants have filed the same special defenses to the second count as to the first, the plaintiff's demurrer in this regard invites the Court to examine the whole record and to give judgment for the party who, on the whole, appears to be entitled to it. *White* v. *Avery,* 1908, 81 Conn. 325, 328; Stephenson, Conn. Civ. Proc. § 94c. Examining the second count of the substituted complaint in the light of these considerations it is apparent that this count alleges a cause of action for civil conspiracy. Our courts do not recognize an independent cause of action for conspiracy. *Benoit* v. *Amalgamated Local 299,* 1963, 150 Conn. 266, 276; *Wyeman* v. *Deady,* 1906, 79 Conn. 414, 417; *Austin* v. *Barrows,* 1874, 41 Conn. 287, 300. Thus the plaintiff gains nothing by repeating the allegations of the first count under a conspiracy label.

Accordingly the demurrer to the first, second, third and seventh special defenses to the first count is sustained, demurrer to the sixth special defense is overruled. The demurrer to the special defenses to the second count is overruled.

Memorandum of Decision on Plaintiff's Motion for Rehearing of Demurrer to First, Second, Third and Seventh Special Defenses to Second Count of Substituted Complaint

(Parskey, J.)

(March 31, 1966)

SUPERIOR COURT
HARTFORD COUNTY

No. 133884

UNITED AIRCRAFT CORPORATION, *Petitioner,*

v.

INTERNATIONAL ASSOCIATION OF MACHINISTS: AERONAUTICAL INDUSTRIAL DISTRICT LODGE NO. 91, IAM; INDUSTRIAL AIRCRAFT LODGE 1746, IAM, *Respondent.*

No. 143885

UNITED AIRCRAFT CORPORATION, *Petitioner,*

v.

INTERNATIONAL ASSOCIATION OF MACHINISTS: AERONAUTICAL INDUSTRIAL DISTRICT LODGE NO. 91, IAM; INDUSTRIAL AIRCRAFT LODGE 743, IAM, *Respondent.*

The Court has re-examined the second count of the complaint in the light of the arguments advanced by the plaintiff in the present motion.

While it is true, as the plaintiff claims, that generally an action does lie for damage resulting from tortious acts done pursuant to a conspiracy, *Williams* v. *Maislen,* 1933, 116

Conn. 433, 437, Section 31-114 of the General Statutes virtually eliminates this type of action in labor disputes. The plaintiff correctly points out that in a civil conspiracy a defendant co-conspirator is liable in damages for injury from acts of a co-conspirator pursuant to the conspiracy, *Ashmead* v. *Colby*, 1857, 26 Conn. 287, 314, but this is precisely what Section 31-114 prohibits. In *Benoit* v. *Amalgamated Local 299*, 1963, 150 Conn. 266, 274 our Supreme Court noted the similarity between Section 31-114 and Section 6 of the Norris-LaGuardia Act 47 Stat. 70 and further accepted the federal construction as announced in *United Brotherhood of Carpenters and Joiners* v. *United States*, 1946, 330 U.S. 395, 406, as applicable to our statute. In *United Brotherhood* at page 404, it is made abundantly clear that under Section 6 participants in a conspiracy are protected against liability for the unauthorized illegal acts of other participants in the conspiracy. Since this is the very heart of the civil conspiracy, once it is eliminated nothing of substance remains. While it is true that participants in a conspiracy are not immunized from responsibility for authorized acts in furtherance of a conspiracy, the plaintiff has already alleged in its first count tortious conduct authorized, ratified and participated in by the defendants; in view of the limitations of Section 31-114 repeating these allegations in the second count under a conspiracy label adds nothing.

Plaintiff's motion for rehearing is denied.

Memorandum of Decision

(Gaffney, J.)

(June 3, 1968)

SUPERIOR COURT
HARTFORD COUNTY

No. 133884

UNITED AIRCRAFT CORPORATION, *Petitioner*,

v.

INTERNATIONAL ASSOCIATION OF MACHINISTS: AERONAUTICAL INDUSTRIAL DISTRICT LODGE NO. 91, IAM; INDUSTRIAL AIRCRAFT LODGE 1746, IAM, *Respondent*.

No. 133885

UNITED AIRCRAFT CORPORATION, *Petitioner*,

v.

INTERNATIONAL ASSOCIATION OF MACHINISTS: AERONAUTICAL INDUSTRIAL DISTRICT LODGE NO. 91, IAM; INDUSTRIAL AIRCRAFT LODGE 743, IAM, *Respondent*.

By agreement of counsel both of the above-numbered cases were tried together. The issues in each were identical. Each complaint was drafted in two counts. Case No. 133884 was brought by the United Aircraft Corporation against the International Association of Machinists: Aeronautical Industrial District Lodge #91, International Association of Machinists: Industrial Aircraft Lodge #1746 of the International Association of Machinists. In case No. 133885 the United Aircraft brought suit against the same defendants with Local #743, International Association of Ma-

chinists being sued in place of Local #1746. Local Lodge #1746 was the lodge covering the aircraft plants at East Hartford and Manchester. Local Lodge #743 was the lodge operating at the Hamilton Standard Division of the plaintiff corporation located in Windsor Locks and Broad Brook, Connecticut. The plaintiff is a Deleware corporation with offices in East Hartford. The defendant International Association of Machinists is an unincorporated association, doing business, acting or carrying out its functions in this State. The defendant Aeronautical Industrial District Lodge #91, International Association of Machinists is an unincorporated voluntary association which had an office and place of business in East Hartford, during periods relevant to this action. The defendants, Local Lodges #1746 and #743 are and were unincorporated voluntary associations which had their offices in East Hartford during periods relevant to these actions. A collective bargaining agreement entered into between the plaintiff, hereinafter referred to as "Aircraft" and Lodge #1746 which had been entered into December 5, 1957, expired December 4, 1959. This agreement covered at the East Hartford Plant approximately 16,850 production and maintenance employees. The agreement between Aircraft and Lodge #743 entered into April 18, 1958, expired April 21, 1960. This agreement covered approximately 7,000 production and maintenance employees. Negotiations to effectuate new agreements between the parties were unsuccessful and a strike was called on June 8, 1960 against the Aircraft at both the East Hartford and Manchester divisions and the Windsor Locks and Broad Brook divisions. Aircraft alleges in the first count in each complaint that between June 8, 1960 and June 13, 1960 the defendants, by reason of a great many enumerated torts committed on the picket lines, unlawfully interfered with its business, as a result of which it was forced to expend large sums of money in increased costs of production; it was prevented from earning profits reasonably to be anticipated; it was prevented

from meeting its contractual obligations; it incurred expense for damage to property of its employees and others, and it was caused to spend substantial sums of money to protect its lawful interests. (This last claim was later abandoned after motion made by the defendants.)

The claimed torts included mass congregation of pickets on the sidewalks behaving in an unruly manner, mass picketing, circular picketing, close formation and shoulder-to-shoulder picketing, malicious and wilful blocking of ingress and egress to Aircraft's premises, the denying of access to Aircraft's premises to its officers, employees, deliverymen, and others desiring to enter and leave the premises for the purpose of conducting lawful business with Aircraft. The use of vile, obscene, abusive, vicious and threatening language and gestures directed by the pickets at these same officers, employees, suppliers, and members of the public entering, leaving or attempting to enter or leave Aircraft's premises is further alleged. These acts were claimed to have been undertaken in an attempt to coerce and intimidate these officers, employees and suppliers from entering or leaving Aircraft's premises. Damage and injury to Aircraft's officers and employees, suppliers and members of the public resulting therefrom are charged. It is further alleged that acts and threats of violence were directed against these same officers, employees and agents of Aircraft.

Aircraft on June 13, 1960 sought a Show Cause Order in Superior Court for Hartford County, asking why an injunction should not issue, restraining the defendants from the alleged tortious acts complained of. On this date a stipulation was entered into between the parties, approved by the Court (Klau, J.) wherein the defendants in each case agreed to wholly and absolutely desist from mass picketing, shoulder-to-shoulder picketing and close formation picketing conducted in such a way as to block ingress and egress at the entrances to the Aircraft's plants. The defendants

further stipulated that their members would refrain from "preventing or interfering by force, violence or intimidation", or "the deposit of nails or other sharp objects on the roadway, or the threat of force or violence to the entrance or egress from said plant of the plaintiff's officers, employees or members of the public". The defendants agreed to limit the number of its pickets at the entrances and to space the distance between its pickets.

The Aircraft claims that subsequent to the approval by the court of the stipulation, and the filing of it in court, the defendants, their officers, agents and members, continued to engage in the tortious acts and activities above described in violation of the stipulation, and that this course of conduct was carried on until the strike was settled on August 11, 1960.

In a second count in each of the two cases, the plaintiff claimed that the tortious and illegal acts alleged in the first count were done in pursuance of a conspiracy.

Compensatory damages in the sum of $10,000,000 are sought by Aircraft in suit No. 133884 against the International, the District Lodge #91, and Local Lodge #1746. Compensatory damages of $5,000,000 are sought by Aircraft in suit No. 133885, against the International, the District Lodge #91 and Local Lodge #743, in Windsor and Broad Brook. Additionally, in each case exemplary damages are sought in such sum as the court finds appropriate.

At the start of the trial counsel agreed and defendants' counsel moved that the issues on liability and damages be separated, and that the plaintiff would first proceed on the issue of liability. This motion was granted. The case was then tried to the court on the issue of liability alone, with an understanding between the parties that if after a full hearing, liability was found to rest upon the defendants, a later hearing in damages would be held.

Early in the trial the court ruled, after objection was made, that it would not hear evidence in support of the

conspiracy count. It ruled that, accurately speaking, there is no civil action of conspiracy under our law, but that such an action is an action for damages caused by acts committed pursuant to a formed conspiracy rather than by the conspiracy itself. See *Cole* v. *Associated Construction Co.*, 141 Conn. 49, 54; *Benoit* v. *Amalgamated, Local No. 299*, 150 Conn. 266, 276.

In each of the instant cases damages were not sought under the conspiracy count. This count, the plaintiff admitted, was designed to be used as a vehicle in each case to introduce evidence to support its claim for damages sought in the first count.

The defendants answered the complaint with admissions of certain paragraphs, including the claimed status of the defendants, and denials of other paragraphs. Additionally, they pleaded several special defenses. Chief reliance is placed on special defenses numbered 4 and 5. In substance these defenses allege that the defendants at no time ever authorized, ratified, or participated in any of the tortious acts set out in the complaint and consequently under the prohibitions of § 31-114 of our General Statutes they were not liable. A sixth special defense claims estoppel and waiver on the part of the Aircraft for its failure to apply to the Superior Court for a restraining order to stop the violations by the defendants of the terms of the stipulation agreed upon and approved by the court on June 15, 1960. This defense was not considered at the trial, since the court felt it pertained primarily to the question of damages.

During a late stage in the trial the defendants advanced a rather novel defense. After evidence had been introduced to show that they incited the mass and illegal picketing leading to the consequential acts of violence, they sought to escape the responsibility for their tortious acts, on the claim that conditions got so far out of hand on the picket lines that their officers and agents in charge were

unable to control the situation, and so should be excused from bearing any burden of guilt.

Although the complaints and answers in these cases are the same, it is necessary to consider each case separately because of the different nature of the overt acts proven in each case.

First consideration is given to the facts proven in case No. 133884, the Aircraft against International, District Lodge #91, and Local Lodge #1746.

Local Lodge #1746 encompassed a bargaining unit of approximately 16,000 hourly employees at the plaintiff's East Hartford plant. Its elected officers at the time of the strike were President Fraser, Vice President Stewart, Treasurer Harlow, Recording Secretary Kohler and Financial Secretary Danahy. In the plant there were elected shop stewards and shop committeemen, each of whom had specific duties to perform during grievance procedures. District #91 was an organization composed of local lodges of the International Association of Machinists and was immediately over the local lodges, being the constitutional administrative arm of the International. Delegates were elected to it by each local lodge of the district. They in turn elected district officers who administered the affairs of the district. District #91 was comprised of Lodges #1746 at East Hartford and #743 at Windsor Locks. The District exists under the constitution of the Grand Lodge, which is also known as the International. Both the local lodges and the district are affiliated with the International. The salaries of the representatives of the district were paid partially by the district and partially by the International or Grand Lodge. The senior business representatives of district #91 in 1960 was John R. Main. Other representatives at that time were George Cope representing Lodge #1746, and John R. Sullivan representing Lodge #743 at Hamilton Standard.

In 1960 Raymond Jutras, an International representative, was an official of district #91 acting as an organizer, being paid partially by the International, and in part by district #91.

Richard Thurer, a representative and agent of the International was assigned in 1960 as the I.A.M. representative to the plaintiff's plant. He was paid solely by the International.

The strike at the plaintiff's East Hartford plant began at 9:00 A.M. on June 8, 1960. Sanctions had originally been granted by the International to begin the strike on June 13 but Department #961 at East Hartford walked out prematurely June 8. The vice president of the International in charge of the New England region, Fred Coonley, immediately sent a telegram to local lodges #1746 and #743 granting sanctions retroactively as of 8:00 A.M. that morning. Later in the morning a mass meeting was held at Union Hall on Main Street in East Hartford. Portions of the events that transpired at this meeting were sound film recorded by W.T.I.C., a Hartford Radio and Television station. The meeting was addressed by Raymond Jutras, the International organizer. He read a telegram which had been sent to John Main, the business representative of district #91, by Fred H. Coonley, vice president of the International. It officially advised that strike sanctions were released to lodges #1746 and #743 as of 8:00 A.M. June 8, 1960. Jutras spoke as follows:

> "VOICE: Now it becomes our job to try to keep as many of the second shift employees from going into that plant as we possibly can and that can only be done by mass picketing. But, listen, Brothers and Sisters, we have been waiting for fifteen years for this. This company has shoved a substandard contract down our throats because they kept us divided. They have demonstrated it today that we will not go back to work until we have the kind of a contract that

we need with United Aircraft. If the officers gave you a hard time, don't argue with the officers. If they tell you to move over here or move over there, do so. Report the incident to us and it will be our responsibility to take it up with the East Hartford Police Department. Remember one thing, the cop has the last say. Don't argue with them. We don't want to see you boys wind up in the jug, but let me assure you of this, if you wind up in the jug, we'll get you out as fast as they bring you in, believe me."

During the following days and until the entry of a stipulation regulating activity on the picket lines, approved by the court on June 13, 1960, the strikers resorted to every kind of illegal picketing. Films taken by the plaintiff at each gate of its plant, show the pickets adopting extreme measures designed to halt all ingress and egress to the plaintiff's plant. Picketers by the hundreds marched in circular formation shoulder to shoulder. Cars trying to enter the plant were blocked off by masses of pickets. Police forcibly pushed picketers aside to open passageways for cars and trucks entering the premises. Drivers and occupants of cars were subjected to a variety of contemptuous gestures. Employees were physically attacked. Profanities and obscenities were shouted along with threats of physical harm. Strikers ostentatiously noted license numbers and occupants of the cars entering and leaving the plant and other strikers took pictures of the cars and occupants, all in an attempt to intimidate workers. Mirrors and radio antennas were torn off cars. The shoving, kicking, pushing and slapping of cars was commonplace. Hundreds of cars turned back. Law enforcement officers, both state and local, were shoved against and on the hoods of the cars. Traffic as a result was snarled and backed up for blocks. Numerous arrests were made. Nails, tacks and other sharp objects were strewn on the highway approaches. The general counsel of the International, Plato Papps, who had been summoned to Hartford the first week of the strike,

and who later testified in this trial as a defense witness, characterized the scene in his testimony after having viewed the movies taken by the plaintiff as follows:

"Q. Now, tell his Honor what did you see in those movies?

"A. A lot of mass picketing. I saw cars being rocked. I don't recall now whether I saw anybody get struck, your Honor, but there was a very wild, unruly mob, mass picketing. I think that's the vest way I can explain it. I think I commented at that time it looked like 'Ben Hur' in modern dress or in modern cars. That's about the sum and substance of it.

Q. All right. Now, following the showing to you of those movies, what if anything did you do next?

A. I looked at the movies. I knew there was going ot be an injunction the next day. I told Joe, I said—Joe Wells, that is—I said, 'Joe, I'm not going to let any court in the country see these movies.' I said, 'I'll take a consent judgment before I do that."

He further testified as follows concerning the picketing that he saw:

"Q. Now, tell his Honor, if you will, something of the procedure that was followed in the courthouse the next day when—were you in court when the case was called having to do with the application for injunction?

A. Oh, yes. I think Mr. Zeman—no, there was a Mr. Apter, Marvin Apter, who was representing Lodge 1746 at that time and Mr. Zeman was counsel for 743.

Q. All right.

A. If my memory is correct, and I told them what I had seen, the motion pictures. I said, 'I'm not going to permit any Court to see these pictures.' As far as I was concerned, any judge that saw them would issue an injunction immediately. I then talked to Mr. Wells. I was permitted—I think I said in open court—I believe I was permitted to—I was introduced to the

Court. I think we met in chambers, Judge Klau, if my memory is correct. I explained to the judge that we didn't condone this. That as far as I was concerned it was illegal activity, and that I was perfectly willing to enter into a stipulation and was quite concerned frankly with people who might be arrested, and I would—with the consent of Mr. Wells we agreed to a stipulation."

Every concept of peaceful and legal picketing was violated. In the case of *Levy & Devaney, Inc.* v. *International Pocketbook Workers Union,* 114 Conn. 319, at 322 the court held as follows:

> "To intimidate is to inspire with fear, to overawe or make afraid. Fear may be inspired without physical violence or spoken threats, moral intimidation may be accomplished by a menacing attitude and a display of force which may coerce the will as effectually as actual physical violence. The gathering of strikers in considerable numbers at the entrance of a factory with threatening attitude toward employees, who must run the gauntlet of a hostile picket line in going to and from work, may overawe and make them afraid by a show of force which itself is intimidating. The well considered authorities all hold that the conduct of a strike may be such as to constitute intimidation though there is no use of force or physical violence. *State* v. *Stockford,* 77 Conn. 227, 237, 58 Atl. 769; *Vegelahn* v. *Gunter,* 167 Mass. 92, 44 N.E. 1077; *Jefferson & Indiana Coal Co.* v. *Marks,* 287 Pa. 171, 134 Atl. 430; *Pierce* v. *Stablemen's Union,* 156 Cal. 70, 103 Pac. 324; *Keuffel & Esser* v. *International Assoc. of Machinists,* 93 N.J. Eq. 429, 116 Atl. 9; *Bomes* v. *Providence Local No. 223,* 51 R.I. 499, 155 Atl. 581; *Truax* v. *Corrigan,* 257 U.S. 312, 42 Sup. Ct. 124; 7 Labatt's Master & Servant, (2d Ed.) § 2706; 1 Eddy on Combinations, § 538; Cogley on Strikes & Lockouts, 292; 32 C.J. pp. 166, 182."

Judge Devlin in his comprehensive and studied opinion on picketing in *Turner & Seymour Mfg. Co.* v. *Torrington Foundry Workers Local 1699,* 18 Conn. Supp. 73 (1952) contrasted legal and illegal activities in the picket lines as follows:

> "In the furtherance of a lawful strike the strikers may use peaceful persuasion to induce other workmen to join them in the strike. Restatement, 4 Torts § 779, comment f, has tabulated some of the several functions performed by picketing in the following language: 'Pickets stationed at the place of business involved in the dispute may observe it to see the extent of operations and the persons who come there for business. They may also, by word of mouth, or signs or placards, seek to dissuade workers and others from entering the plant for purposes of business or from otherwise doing business with the employer. Their mere presence at the plant may be sufficient notice to persons interested that the plant is involved in a labor dispute. Picketing may also be a means of maintaining the morale of the workers involved in the dispute, and of exhibiting to others their unity and determination. Rumors that the workers' morale is weakening, that their ranks are suffering serious defections, and that the strike is being abandoned in favor of a return to work may bring defeat to the workers' cause and are sometimes circulated for that very purpose. Picketing may dispel such rumors.
>
> The term 'peaceful picketing' implies not only the absence of violence but the absence of any unlawful act. It authorizes picketing which does not interfere with the person or property of another by the unlawful use of force, violence, intimidation or threats. It precludes any form of physical obstruction or interference with an employer's business or the misrepresentation of the facts of the controversy, and should not go beyond the area of peaceful persuasion.

The boundary between lawful and unlawful conduct is that between peaceful persuasion and intimidation. The claim of the defendants that intimidation or coercion cannot be found to exist in the absence of actual physical violence or express threats of physical injury to person or property is not well founded and is not in accord with our law.

The legality of picketing in each case depends upon its purpose and the conduct of the pickets. Picketing becomes unlawful if it goes beyond the allowable area of peaceful persuasion and assumes the form of intimidation, threats or violence, impedes traffic to a place of business, or interferes with the free use of property. As to the number of pickets who may be employed in any particular picket line, there is no rule fixing the number at a definite figure. Each case must be judged upon its own particular set of facts. Restatement, 4 Torts § 799, comment h, summarizes the problem in the following language: 'The question is in each case whether the number of pickets plus the attendant circumstances are such that fear of physical harm rather than persuasion is the force loosed upon the persons sought to be influenced. Thus it is important to consider the kind of place picketed and the character of persons sought to be influenced, that is, for example, whether the place picketed is a foundry approached only by men or a department store patronized chiefly by women. It is important also to consider the character of the pickets, whether they are, for example, shy women or rough men. And it is important to consider the conduct of the pickets: whether they behave in a quiet, orderly manner or are boisterous and equipped with weapons of physical harm; whether they obstruct access to the place picketed so as to make ingress or egress difficult or do not interfere with it at all. Other factors may also be important, as, for example, the presence or absence of private guards or

public police and the extent of protection afforded by them. In some circumstances, then, picketing may be a form of peaceful persuasion, though the number of pickets is large; in others, the picketing may not be fair persuasion though the number is small.

Interference with a free right of ingress and egress to and from a plant by those who had such a right is unlawful. *American Steel Foundries* v. *Tri City Central Trades Council,* 257 U.S. 184. Mass and circular picketing is in the same category. *Goldfinger* v. *Feintuch,* 276 N.Y. 281, 286, 116 ALR 477. Likewise, the gathering of strikers in considerable numbers at the entrance of the factory with a threatening attitude towards employees who must run the gauntlet of a hostile picket line in going to and from work may overawe and make them afraid with a show of force which in itself is intimidating.' *Levy & Devaney, Inc.* v. *International Pocketbook Workers Union,* supra.

> In the present case, the conduct of the pickets in interfering with those having business with the plaintiff from entering the plant, in picketing in close formation and within circles, and in using offensive language or gestures amounting to intimidation exceeded the bounds of peaceful picketing, and such action was not 'awful' conduct within the meaning of the term in the statute."

The official publication of the I.A.M., The Machinist, in a front-page article in the July 7, 1960 issue, applauded the fact that pickets had lain across the tracks at an East Hartford railroad siding entrance to the plaintiff's plant and stopped a train from entering the plant.

The following officers of the International district # 91 and local # 1746 participated in these illegal activities: Richard Thurer, International representative of the Grand Lodge, Raymond Jutras, an International representative

and the business organizer of #91, and business representatives Robert Nelson and George Cope of district # 91. The local officers who participated were president David Fraser and vice president Stewart. The union stewards and committeemen of local # 1746 who participated were Jean Senecal, William Washington. Zora Fraser, wife of the president of local # 1746, Eleanor Murphy, Thomas Radevitch, Robert Wagner, Condon, Ritchie, Alice Muise, Bryzowy, James Mikelis, Robert Perkins, Grace Baker, Wally Jensen, Moody, Arthur Hepp, Paulson, Libby, Gorry, Stuart Pinchaud, Malley, Wittman, Gene Rippolone, Harry Amera, Gordon Sawyer, Vanderhoven, Malcolm Madison, Bernard McGuinness.

Senior business representative John Main was constantly at the scene observing and voicing no objection.

Following the entry of the stipulation in court June 13, 1960, the threats, acts of intimidation, harassment by phone calls, physical damage to cars and property of nonstrikers continued. From the time the strike started on June 8th until the end of the strike August 11th the personnel director of the plaintiff corporation at the East Hartford plant received in excess of 1,000 complaints concerning such activities, a majority of them being received after June 16th, a date subsequent to the entry of the stipulation.

At the start of the strike June 8th the Grand Lodge representative, Richard Thurer, assigned to district # 91, made a tour of the different gates leading to the aircraft's property and noted that the strike was getting out of hand. He immediately called general counsel Plato Papps in Washington, asking for legal help in anticipation of a restraining order being sought by the plaintiff. He then called the general vice president, Frederick Coonley, and asked for three other Grand Lodge representatives to be sent in to assist him in the handling of the strike. From June 8th on, conditions at the various gates worsened from day to day. The three Grand Lodge representatives who

were sent to East Hartford by vice president Coonley, were George Poulin, James Moore and Anthony Gilio. Moore was assigned by Thurer to the Hamilton Standard lodge # 743 at Windsor Locks. Poulin was kept in East Hartford working with Thurer until the strike was settled. Gilio having been called by Thurer was assigned to a Massachusetts plant in relief of Thurer at that plant.

The vice president of local # 1746 at the time of the strike was William Stewart. His activity in the affairs of local # 1746 began in 1955 when he became a steward, continuing as such until 1957 when he was elected to the shop committee. He continued as a shop committeeman until June of 1960. In the summer of 1959 he became vice president. In making preparation for the strike the Executive Board of # 1746 consisting of the president, vice president, secretary, treasurer, three trustees and nine or ten committeemen comprising the shop committee, named Stewart a vice charman of the strike policy committee. In attendance at this meeting of the Executive Board as advisors were Cope, Jutras and Main.

A strike fund had been set up in local # 1746 from dues collected over a period of years from union members. To be entitled to strike benefits from International, it was necessary for one to have been a member in the International for a minimum period of six months. Strike benefits were then paid to those strikers qualifying at the rate of $35 per week, starting the second week of the strike. To equalize benefit payments to those members of # 1746 lodge who did not qualify, not having been in the International for the required period, and who received but $15 weekly benefits from the local strike fund, Stewart set up and had sole charge of a collection box located on the stage of Union Headquarters where the benefits were paid by the International. An arrangement had been made with an armored car company for the cashing of all benefit checks at headquarters. Voluntary contributions to help those strikers not entitled to full benefits were dropped into the box by

many strikers receiving full benefits. The contributions for the first three weeks of the strike were turned over to the secretary and treasurer of local lodge # 1746. About $1,000 per week was collected in this manner. After the first three paydays, Stewart the vice president, began to withhold about $50 to $75 a week of the money collected. A portion of this sum was given to three strikers, McLaughlin, a union steward of # 1746, Potter and Ford. On three different occasions they received about $25 to $30 a week. The purpose of giving money to these men was to support their activities as "night riders". As such they damaged automobiles of nonstriking employees. They flooded the cellars of their houses, they burned their hedges, they threw paint bombs through their house windows. They tried to burn a barn behind a house where many nonstrikers lived. They burned one of the nonstriking employee's automobile. Poulin, the International representative, had full knowledge of the activities of these men and acted in conspiracy with them to further their aims. They reported to him what they did. Poulin instigated and encouraged these acts of violence. The reason for this was that as of the week of June 27th the strike had been going badly, more than 10,000 hourly workers having returned to work. Poulin directed Stewart to give money to these three night riders to aid and abet their criminal acts. About the seventh week of the strike Poulin and Potter approached Stewart and Poulin told Stewart that Potter had found a pellet gun and needed $26 to buy it. Poulin instructed Stewart to give Potter the money to buy it, which Stewart did and later advised Poulin that he had followed his instruction.

On August 4, 1961 Stewart voluntarily went to the East Hartford Police Department and gave information to the police concerning the acts of criminal violence committed by the trio of strikers, Potter, McLaughlin and Ford. He told the police that Poulin, Cope and Davis had been furnishing these men the names of those employees returning to work, the purpose being that McLaughlin, Potter and Ford would

harrass, intimidate and threaten the named workers or settle with them in some way or another. Stewart offered to testify in a court of law concerning these criminal activities. At that time he submitted to a lie-detector test. He signed a statement outlining these charges. This was witnessed by the chief of police and the captain of detectives of the East Hartford Police Department. A police investigation followed.

Cope is still employed by district # 91, lives in Hartford County, was available to take the witness stand to refute the testimony of Stewart but did not do so and made no appearance in court.

Poulin is still employed by the Grand Lodge International as a Grand Lodge representative, and is still paid by the International. He lives in Glastonbury, Hartford County, and was available to take the witness stand and refute the testimony of Stewart but did not do so and made no appearance in court.

The situation at the Hamilton Standard division of the plaintiff's corporation ran such a close parallel to the East Hartford Aircraft situation that it was clearly demonstrated that the unions at both these divisions were acting in concert. The strike was started the same day, June 8. Although the president of local # 743, Butler Seedman, testified that he alone was responsible for calling the strike at Hamilton Standard, his own later testimony belied this statement when he admitted that a prearranged telephone call to Union Headquarters in East Hartford was the signal for the strike to start at Hamilton Standard. This was not the only unbelievable portion of his testimony. Another part was when after first denying that in 1960 at the time of the strike he was a member of district # 91, he later, under examination by the court, admitted that he was. Hamilton Standard had a bargaining unit of about 4,000 hourly employees, sixty per cent of whom were members of local lodge # 743 of the I.A.M. In preparation for the

strike, originally scheduled for June 13, and for which sanctions had been granted by the International, twenty-five I.A.M. strike manuals containing instructions on how a striker should conduct himself, were distributed to the officers and the strike committee. In further anticipation of trouble on the picket lines, the strike committee screened the union members for picket duty in an effort to eliminate the hot heads who might generate the trouble. The absurd result of this effort was that a grand total of three union members out of 2,400 were forbidden to take their places on the picket lines. Two were assigned to parking cars and the third was assigned to work at headquarters.

The pre-arranged telephone call made by Seedman to Union Headquarters in East Hartford, was made at 9:55 A.M. June 8. Receiving word that the walkout had started in East Hartford, Seedman in turn called Ann DeFillipo at Broad Brook and the first shift employees of Hamilton Standard at both the Windsor Locks plant and the Broad Brook plant then walked out.

Immediately picket lines were established and a chaotic condition resulted. Hundreds of workers blocked the entrances to the plaintiff's plant. Cars and people were denied access. Threats were made by the picketers, and vituperative and obscene remarks were hurled at anyone seeking ingress to or egress from the plaintiff's property. The picketers became a wild and unruly mob, pummelling cars, tearing off antennas and mirrors from cars, using every means to intimidate those seeking legitimately to enter the plant. Cars seeking ingress had to turn back. Traffic was blocked for a distance of better than one-quarter of a mile. Alexander Latka, a committeeman and assistant chairman of the strike committee, using a bullhorn exhorted the strikers not to let the cars in. Committeewoman Ann DeFillipo, who was also on the strike committee, using a bullhorn, threatened and insulted those seeking to enter or leave the plaintiff's premises. Police had a difficult time making passageways for vehicles. Arrests were made. Ad-

mittedly the strike was out of control from the very moment Seedman, the president of the union, left the factory and tried to get out of the premises. In an attempt to bring order out of this chaotic condition, he admonished the pickets; told them what they were doing was illegal; and complained to the picket committee chairman and captains, ordering them to limit the number of pickets. According to his testimony all this proved fruitless. Thereafter he joined the ranks of the pickets on the illegal picket line himself. In a further attempt to restore order he complained about the situation on the picket lines being out of control to the business representative of the International, John R. Sullivan. Sullivan is the same individual who urged the strikers to picket in masses, and to block anyone from entering or leaving the plaintiff's property. Sullivan also participated in the illegal picketing. Seedman's and Sullivan's attempts to control the situation were spurious and insincere. Seedman's insincerity and duplicity was clearly demonstrated when at a later date the International chief counsel Plato Papps addressed the unions at Bushnell, seeking to end the strike. He at the time particularly noticed Seedman in the gallery laughing at him as he, Papps, was being booed down.

Besides Seedman. who was the president of # 743 and was also an officer of district # 91 being on the picket line participating in the illegal strike actions, the following officers, stewards and committeemen participated: Francis McCann, strike committeeman and chairman of the picket committee, William Merrigan, vice president of # 743, International representative John R. Sullivan, who was the business representative of district # 91, stewards Cosmos Briotta, Italo Pardi, who was also treasurer of # 743, Eugene Carter, Andrew Sidorsky, Edward Davis, Stephen Oski, Alexander Latka, Mitchael Piccin, Edward Butchelder, who was also a vice president of # 743, Alexander Cattoro, William Sander, who was a member of the negotiating committee, and Ann DeFillipo, committeewoman.

Two additional Grand Lodge representatives, James Moore and William Brenner, were at the Windsor Locks gate of the Hamilton Standard daily during the strike. The official newspaper of the I.A.M., The Machinist, in its front page article in the July 7, 1966 issue, applauded the fact that "Twenty girls pickets, on strike for the first time in their lives, refused to back down one inch for 14 brawny State Police at a United Aircraft plant in Broad Brook, Conn."

Seedman other than mildly reproving the picketers, complaining to Sullivan, and passing out the strike manuals, did nothing to remedy and end the mob scene and the illegal activities of the strikers. On the contrary along with Sullivan the International representative, Moore and Brenner the other International representatives, he took to the picket lines and participated in the strike. The other officers and agents of # 743 did the same.

This illegal activity on the picket lines ceased abruptly the moment the stipulation was agreed upon and approved by the court. Thereafter, however, hundreds of complaints of harassment were made to company officials. These included damage to personal property, autos, threats, obscenities and vituperations. The complaints continued until the end of the strike August 11, 1960.

Four defenses to these actions are relied upon by the defendants. The first is that without proof of damage resulting from the illegal acts the plaintiff asserts the defendants committed, the plaintiff lacks standing to sue. The short answer to this is that the defendants themselves at the initial stage of the trial proposed to separate the liability issue from the issue of damages and suggested that the cases proceed on a determination of liability first and then in the event liability was found to exist, to hold a separate hearing on damages. The plaintiff agreed to this. This agreement was approved by the court and it was read into the record at the start of the trial. It ill becomes the de-

fendants at the very end of the trial to attempt to reverse their position, a position which they themselves first brought about. This attempted reversal is rejected.

A second claim is that the suit is barred by the one-year statute of limitations. The section invoked to support this claim is Sec. 52-589 of our General Statutes, Revision of 1958. This section deals with suits based on negligence and reckless misconduct. The plaintiff brought suit, however, under Section 52-577. This provides "No action founded upon a tort shall be brought but within three years from the date of the act or omission complained of. (1949 Rev. § 8316). Obviously this is the statute that controls, not the negligence statute. The torts that were committed were definitely intentional. This claim of the defendants has no merit whatsoever.

The third defense is that the strike situation got out of control and therefore the defendants should be excused from responsibility for whatever happened thereafter. If this claim has merit, it is the complete answer to all the problems confronting labor unions during violent strikes, for a claim of losing control would exculpate the unions and their officers from any and all wrongs that ensued.

The case of "*The United Mine Workers of America* v. *Gibbs,* 383 U.S. 715," the governing case involving jurisdiction of state courts in labor disputes, is relied on to support this claim. This 1965 case defined the proof requirements under Section 6 of the Norris-LaGuardia Act. Additionally it dealt with the standards of agency required under Sec. 303 of the Labor Management Relations Act as compared with Sec. 6 of the Norris-LaGuardia Act in which section the words "clear proof" are found. In reviewing the legislative history of the Labor Management Relations Act passed by Congress subsequent to the Supreme Court's decision in the case of "*Brotherhood of Carpenters* v. *U.S.,* 330 U.S. 395" it ruled that the more stringent requirement of proof found in Sec. 6 of the Norris LaGuardia Act, to

wit, "clear proof" was not repealed. The court commented as follows:

> "Shortly thereafter, Congress passed the Labor Management Relations Act, which expressly provides that for the purposes of that statute, including § 303, the responsibility of a union for the acts of its members and officers is to be measured by reference to ordinary doctrines of agency, rather than the more stringent standards of § 6. Yet although the legislative history indicates that Congress was well aware of the Carpenters decision, it did not repeal § 6 outright, but left it applicable to cases not arising under the new Act. This selectivity is not surprising, for on state claims, though not on § 303 claims, punitive damages may be recovered. The driving force behind § 6 and the opposition to § 303, even in its limited form, was the fear that unions might be destroyed if they could be held liable for damage done by acts beyond their practical control. Plainly, § 6 applies to federal court adjudications of state tort claims arising out of labor disputes, whether or not they are associated with claims under § 303 to which the section does not apply.
>
> Although the statute does not define 'clear proof,' its history and rationale suggest that Congress meant at least to signify a meaning like that commonly accorded such similar phrases as 'clear, unequivocal, and convincing proof.' Under this standard, the plaintiff in a civil case it not required to satisfy the criminal standard of reasonable doubt on the issue of participation, authorization or ratification; neither may he prevail by meeting the ordinary civil burden of persuasion. He is required to persuade by a substantial margin, to come forward with 'more than a bare preponderance of the evidence to prevail.' *Schneiderman* v. *United States,* 320 U.S. 118, 125. In our view, that burden was not met."

The defendants here have taken out of this context the phrase "unions might be destroyed if they could be held liable for damage done by acts beyond their practical control," distorting the meaning of the phrase, and fallaciously arguing that this was the decision of the Supreme Court in that case. This phrase was included merely by way of legislative review and was not in any way the decision of the court in this case.

Reference might be made at this point, however, to the minuscule attempts made by the defendants here to bring order out of the chaotic strike situation they engendered. They mildly admonished those engaged in illegal picketing. They passed out pamphlets, containing instructions as to how to behave on the picket line (25 in all), they screened those known to be hot heads (3) and assigned them to other duties. That these feeble efforts would prove totally inadequate was a foregone conclusion and must have been known to the defendants.

The parent union all this while had in its hands the weapons to brink a quick halt to the chaotic conditions in (1) the firing or recall of agents for activities detrimental to the organization; (2) the revocation of sanctions, and (3) in the event the local got completely out of control, as was the situation here, the International could have taken over the local under a trusteeship, an action permitted under the Landrum-Griffin Act, and a procedure written into the constitution of the International. None of these remedial methods was resorted to. The court rejects this defense.

The final defense is that the defendants under Sec. 31-114 enjoy complete immunity from this action. Sec. 31-114 reads as follows:

> "No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute, shall be held responsible or liable in any court for the unlawful acts of individual officers, members or agents, except upon

proof of actual participation in, or actual authorization of, such acts, or ratification of such acts after actual knowledge thereof." (1949 Rev., § 7410)

It is patterned after Sec. 6 of the Norris-LaGuardia Act, the difference being that under the Norris-LaGuardia Act the phrase reads "upon *clear* proof" as distinguished from our statute which merely requires proof.

The statute was interpreted by our own Supreme Court in the case of *Benoit* v. *Amalgamated Local 299*, 150 Conn. 266. In this case the suit was brought against the union, the union's International organizer individually, and another member of the union. The court stated at p. 273:

> "We have not heretofore been called on to apply the language of 331-114 in circumstances such as the present. Under the statute, liability could not be imposed on the union for the unlawful acts of its individual officers, members or agents except on proof of (1) actual participation in, (2) actual authorization of, or (3) ratification of those acts by the union. The union could act only through the instrumentality of individuals. The court, in its judgment, absolved Kaplan and Ciccolallo, the only individual defendants remaining before it, from any liability for their actions in the picket line, and based the union's liability for what occurred solely on the grounds of authorization and ratification. The element of participation by the union in any activity at the gate is, therefore, not involved in the case before us."

Therein the *Benoit* case differs from the instant case. In this case participation is the ground on which these defendants are to be held responsible. It would be naive indeed to expect that a union will go on record authorizing illegal activities before they take place or ratifying the same activities after they took place. However, there still is some proof of authorization in this case, although it is in-

sufficient to sustain the burden required. It appears in the previously mentioned statements of Jutras and Sullivan.

Section 31-114 provides almost complete immunity to unions and their officers. The question of what constitutes participation sufficient to hold a union responsible has not as yet been decided by either our state Supreme Court or by the United States Supreme Court. Participation was considered by the United States Supreme Court in the *Union Workers* v. *Gibbs* case (supra) but the proof there of factual participation on the part of the union through the activity of its field representative was found lacking. The court found in that case that at the time of the troubles on August 15 and 16, 1966 no representative of the U.M.W., their International union, was present. It further found that the field representative of the union for the area was away attending an executive board meeting and did not return until later in the day on the 16th. He first learned of the violence while at the executive meeting. He returned with explicit instructions from his International union superiors to establish a limited picket line, to prevent any further violence, and to see to it that the strike did not spread to the neighboring mines. There was no further violence at the mine site. The picket line was maintained there for nine months. This situation contrasts sharply with the activities of the defendants in this case. There the court was faced with total absence of proof of participation by the defendants. Here there is a plenitude of proof of participation.

The Court there stated at p. 732:

> "In the present case, petitioner concedes that violence which would justify application of the state tort law within these narrow bounds occurred during the first two days of the strike."

During these two days, as noted above, no representative of the International was present, the field representative

returning late on the second day and ending the violence and the illegal picketing.

The Court held, at p. 735:

> "Petitioner vigorously contends that § 6 applied to the state claims in this case; that, on this record, it cannot be charged with having participated in or authorized the violence of August 15-16; and that it acts once it learned of the violence fell short of what would be necessary to show either ratification of the violence or any intent to build its picketing campaign upon the fears the violence engendered. We agree."

It further held, on p. 735:

> "At the outset, it is clear that the requisite showing was not made as to possible union authorization of or participation in the violence of August 15 and 16. Although it is undoubtedly true that the officers and members of Local 5881 were present in force at the mine site on those days, neither the Local nor they are parties to this suit. Mr. Gilbert, the UMW representative, had left the area for a business meeting before the series of events culminating in the violence and immediately upon his return, the violence subsided."

And again on p. 739:

> "What is required is proof, either that the union approved the violence which occurred, or that it participated actively or by knowing tolerance in further acts which were in themselves actionable under state law or intentionally drew upon the previous violence for their force.
>
> The record here is persuasive that the petitioner did what it could to stop or curtail the violence. There was repeated and uncontradicted testimony that when news of the violence reached the meeting that Gilbert was attending, he was given firm instructions to return to the scene, to assume control of the strike, to suppress violence, to limit the size of the picket line, and to assure that no other area mines were affected."

The *Gibbs* case is readily to be distinguished from this case where so many agents and officers of the defendant participated in so many of the illegal activities and so many acts of violence.

If a union is not to be held responsible for the tortious acts of its officers and agents, then § 6 of the Norris-LaGuardia Act and § 31-114 of the General Statutes are meaningless and both Congress and our legislature have indulged in labored acts of futility. Only the super credulous would believe that a union would go on record authorizing illegal activities and violence or ratify the same after they occur. If these defendants are not to be found responsible on the clear proof of the participation of their officers and agents in legal acts, and are on the contrary entitled to a total exemption of responsibility from all such acts, then the statute has no place in our laws and should be removed from the statute books.

The defendants are found liable to answer in damages for the tortious acts committed during the strike.

Memorandum of Decision on Hearing in Damages

(Gaffney, J.)

(November 26, 1968)

SUPERIOR COURT
HARTFORD COUNTY

No. 133884

UNITED AIRCRAFT CORPORATION, *Petitioner,*

v.

INTERNATIONAL ASSOCIATION OF MACHINISTS: AERONAUTICAL INDUSTRIAL DISTRICT LODGE NO. 91, IAM; INDUSTRIAL AIRCRAFT LODGE 1746, IAM, *Respondent.*

No. 133885

UNITED AIRCRAFT CORPORATION, *Petitioner,*

v.

INTERNATIONAL ASSOCIATION OF MACHINISTS: AERONAUTICAL INDUSTRIAL DISTRICT LODGE NO. 91, IAM; INDUSTRIAL AIRCRAFT LODGE 743, IAM, *Respondent.*

Memorandum of Decision on Hearing in Damages

This court in a decision dated May 31, 1968 found the liability issues in favor of the plaintiff and ordered a hearing in damages to proceed. The plaintiff opened this hearing by calling as witnesses 190 employees from the Pratt & Whitney Division of the plaintiff and 23 employees from the Hamilton Standard Division. With very few exceptions, they absented themselves from work because they were afraid to return. They had seen, heard about,

read about, or experienced the violence of the picket lines. The stipulation between the parties to this suit limiting the number of pickets in no way brought an end to the harassment and intimidation of the workers. Many of these were plagued by threatening phone calls. Others suffered property damage to home and cars. The threats and acts of intimidation created a situation in which employees who wanted to return to their jobs, did not report because they were fearful of consequences. Through the testimony of these witnesses, a clear pattern of lost work days directly and proximately attributable to the illegal acts of the defendants was established. The plaintiff offered to produce approximately one thousand additional employees, all of whom had already been interviewed. A great majority of these, in an offer of proof made by the plaintiff's counsel, would have testified that they desired to return to work but were apprehensive about doing this. The court deemed it unnecessary to have these witnesses appear.

The plaintiff introduced Herbert R. Northrup, an industrial relations consultant with a long and impressive background in the labor relations field. As professor and chairman of the Department of Industry of the Wharton School of Finance and Commerce of the University of Pennsylvania, a text writer, a consultant in labor economics and industrial relations, he qualified as an expert in the field. He had read the transcript, the briefs and court's decision in this case. He had studied the exhibits and viewed the motion pictures. The court has given credence to his testimony. Absent the violence, the strike at the Pratt & Whitney Division would not have lasted beyond three weeks, and the strike at the Hamilton Standard, where a much stronger union existed, would not have extended beyond four to six weeks. At the end of the three-week period at Pratt & Whitney, fear was the reason fifty per cent of the employees did not report for work. This percentage diminished gradually so that by the end of

July, 1960, twenty-five to thirty-three and one-third per cent of these employees were still out of work for fear of their own safety. At Hamilton Standard by the end of the strike, twenty per cent of the work force failed to report for the same reason.

Charles B. Preston, Comptroller of the plaintiff company, testified, from a formula which he devised, to the damages incurred by the plaintiff during the strike period at both Pratt & Whitney and Hamilton Standard Divisions. (Plaintiff's Exs. F and J). The logic and the mathematical correctness of the formula was supported by Mr. Wyman G. Patton, a C.P.A. and a partner in Price Waterhouse & Co. with twenty years' familiarity with the plaintiff's standard cost accounting system. Support for the Preston formula was also given by the principal defense expert in cost accounting, James Bassage, who testified that the fromula was fair, acceptable, and proper in comparing excessive costs in one period with another. He characterized it as being a very ingenious and competent job. The foundation stone of the formula is the number of man days lost attributable to the acts of the defendants during the strike. From this arises the claimed excess of manufacturing costs and the loss due to overhead and other expenses borne by the plaintiff without reimbursing compensation. The losses at each of these two plants were predicated on these two elements, which, when transposed into dollars and added together, constituted the Company's loss. The first consisted of a comparison of increased costs in the strike period in certain categories, as compared with the standard direct labor manufacturing costs under normal operation during the same period. The increases were noted in the following categories: labor efficiency variance, overtime premiums, corrective work, spoiled work; training, and at Hamilton Standard, in lieu of training, make-or-buy conversions. The claimed increases in the excessive manufacturing costs at Pratt & Whitney amounted to $1,208,352 for the period of the

strike. The second was a compilation of the increase in overhead and other expenses, called "overhead burdens", allocable to the reduction of the level of manufacturing operations during the strike period at Pratt & Whitney. The increased costs in overhead burdens were claimed to be $7,171,632. The combined total of the two was $8,379,984, from which is subtracted a portion attributable to man days lost during the strike at the North Haven plant of the plaintiff (where no claim of strike violence is made) in the amount of $2,371,535, leaving a total damage claim of $6,008,449.

At Hamilton Standard the claimed cost under the first element (excessive manufacturing costs incurred during the strike period) was $205,017. The second element (overhead burdens) was $2,233,203. The total of the two was $2,438,220.

The defendants quarrel only with the formula for both Pratt & Whitney and Hamilton Standard in regard to the failure of the plaintiff to shred out the categories making up the total excessive manufacturing costs in greater detail and with the increased costs charged to overhead burdens and not the formula itself.

Losses directly and proximately caused by illegal strike activities are proper elements of damage. See *Overnite Transportation* v. *Teamsters*, 257 N.C. 18 (other citations). As held in *United Electrical, R. & M. Workers* v. *Oliver Corp.*, 205 .F.2d 376, 387 (8th Cir. 1953): "When productive labor in a plant is reduced for any period to less than the normal, the company sustains a loss in the expenditure of necessary overhead for which it receives no production." For another similar example see *Steelworkers* v. *CCI Corp.*, 395 F.2d 529 (10th Cir. 1968); also *Local Union 984, Int. Bro. of Teamsters, etc.* v. *Humko Co.*, 313 F.2d 869.

The Connecticut Supreme Court allows damages for losses resulting from additional costs brought about by

reason of injuries received. *Ball* v. *Pardy Const. Co.*, 108 Conn. 549, 551; *Moiger* v. *Conn. Ice Cream Co.*, 146 Conn. 551, 554.

The fact that an exact determination of damages cannot be made with certainty does not bar or preclude an ascertainment of the damages. What is required is a reasonable basis for a reasoned conclusion.

> "Where a defendant has by his wrongful conduct made the calculation of damages difficult, he will not be heard to urge such difficulty as a reason for not assessing by approximation. *Eastman Kodak Co.* v. *Southern Photo Materials Co.*, 273 U.S. 359, 378, 47 S.Ct. 400, 71 L.Ed. 684. Although applied to a different set of facts, what we said in *Ball* v. *Pardy Construction Co.*, 108 Conn. 549, 551, 143 A. 855, is applicable here: "From the very nature of the situation, the amount of loss cannot be proved with exactitude and all that can be required is that the evidence, with such certainty as the nature of the particular case may permit, lay a foundation which will enable the trier to make a fair and reasonable estimate . . . . Mere difficulty in the assessment of damages is not a sufficient reason for refusing them where the right to them has been established.' . . . " *Crowell* v. *Palmer,* 134 Conn. 502, 511.

This rule is in direct line with the federal authorities cited above.

The strike ended August 11, 1960. The plaintiff is not entitled to claim, as it does in its formula, the entire number of work days lost during the strike (based as it is on a normal 5-day work week) because it concedes that at Pratt & Whitney the strike under normal non-violent conditions would have lasted three weeks and at Hamilton Standard under normal non-violent conditions the strike would have

extended four to six weeks. No claim, therefore, is allowed for any manpower shortage by reason of fear of reporting during the three-week period at Pratt & Whitney and the four to six-week period at Hamilton Standard. Any work stoppage during these workdays would have been due to a lawful strike. The court does not accept the theory that the calling of the strike in the first instance was an illegal act, and that the defendants should pay all damages accruing to the plaintiff for the entire duration of the strike as a consequence thereof. The elimination of the three-week period (15 workdays) at Pratt & Whitney reduces the number of man days during which a portion of the labor force failed to report from 37 to 22. During these days the excessive manufacturing costs and the overhead burdens apply. During these same 22 days, which extended from late June to July 29, many workers overcame their apprehensions about their personal safety and returned to their jobs. In late June, fifty per cent of those still not reporting did not do so because they were afraid to report. By July 29, however, this percentage had diminished from 33⅓ to 25%.

The plaintiff's claimed loss of $6,008,449 is based on the excessive manufacturing costs plus the overhead burdens for the full strike period on a one hundred per cent claim of work loss for all employees not reporting for work except those who were hard core union members and sympathizers.

The court adopts the elements of the plaintiff's formula but arrives at a finding of damages in the following manner: The total claimed damages in the amount of $6,008,449 is divided by 37, the total number of claimed man days lost. This results in a per diem man day loss to the plaintiff of $162,391. This per diem rate is then multiplied by twenty-two days [the 15 days, or three-week period having been eliminated] during which the loss of manpower due to the

illegal activities and the resultant fear of employees to return to their jobs can be charged. This result is $3,572,602. During these days, which extended from late June to July 29, there was at the start, a fifty per cent deficiency in the work complement ascribable to fear, diminishing daily until at the end of July (the first two weeks in August being the normal annual vacation period) there was a work deficiency of from thirty-three and one-third per cent to twenty-five per cent. Taking the twenty-five per cent figure and striking a mean between this percentage and the fifty per cent percentage gives a mean percentage of thirty-seven and one-half per cent. This percentage is then taken of the sum total of the 22 days multiplied by the per diem rate of $162,391. The damages then found to be due to the illegal acts of the defendants are $1,369,725.25. (See appendix.)

In the case of Hamilton Standard the same method of computation is used. The claimed damages of $2,438,220 is divided by the 33 man days lost to determine a per diem loss of $73,885. At Hamilton Standard the six-week period estimated for normal strike would have ended July 29. Any claim of reduced manpower is limited to the 6 working days in August. (The annual vacation at this plant occurs the last two weeks of July.) Multiplying the per diem rate by 6 and taking twenty per cent of this amount leaves a finding of damages at Hamilton Standard in the amount of $88,662 as a result of the illegal strike activities. (See appendix.)

At no time from the period of the strike to the institution of these lawsuits or at any later date did the plaintiff waive its claims for damages nor condone the acts of the defendants, nor did the plaintiff use these lawsuits for bargaining purposes to induce the defendants to withdraw their claims in their action in the United States District Court.

The plaintiff, Pratt & Whitney, is entitled to damages in the sum of $1,369,725.25 with interest from August 12, 1960.

The plaintiff, Hamilton Standard, is entitled to damages in the sum of $88,662 with interest from August 12, 1960.

The conduct of the defendants, comprising as it did wanton and violent acts, bringing injury to the plaintiff, justifies an award of exemplary or punitive damages. *Triangle Sheet Metal Works, Inc.* v. *Silver,* 154 Conn. 116, 128.

The following expenses of litigation are allowed:

Wiggin & Dana	$160,000
Wells	9,500
Costs of investigation	20,000
Witnesses	12,000
Accounting	20,000
Personnel Expenses	60,500
Price Waterhouse & Co.	5,000
Preparation	4,000
Showing of films	5,000

Two-thirds of these exemplary damages are to be applied to case No. 133884, Pratt & Whitney; and one-third are to be applied to case No. 133885, Hamilton Standard.

Judgment may enter in accordance with the above.

APPENDIX (to Memorandum Decision)

FORMULA

PRATT & WHITNEY DIVISION

37 total man days	$162,391	(per diem man day loss		(per diem man		
lost during strike 37)	$6,008,449	(claimed loss)	$162,391	day loss	$3,572,602	
			x 22	(number of days lessened work force due to strike after 15 work days of a normal elimination of	x 37½%	(mean percentage of workers absent due to fear of returning.)
			$3,572,602	strike period.)	$1,369,725.25	DAMAGES

HAMILTON STANDARD DIVISION

33 total man days	$73,885	(per diem man day loss)		(per diem man		
lost during strike 33)	$2,438,220	(claimed loss)	$ 73,885	day loss)	$ 443,310	(percentage of
			x 6	(number of days lessened work force due to strike after normal strike	x 20%	workers absent due to fear of returning.)
			$ 443,310	period.)	$ 88,662	DAMAGES

UNITED AIRCRAFT CORPORATION

v.

INTERNATIONAL ASSOCIATION OF MACHINISTS ET AL.

(two cases)

Actions to recover damages for losses resulting from tortious conduct and wilful and malicious acts during a strike, brought to the Superior Court in Hartford County and tried to the court, *Gaffney, J.*; judgments awarding the plaintiff compensatory and exemplary damages and appeal by the defendants and by the plaintiff. *Error in part; new trial.*

Norman Zolot and, of the District of Columbia bar, *Mozart G. Ratner*, for the appellants (defendants) in each case.

John D. r'assett, with whom was *S. Robert Jelley*, for the appellee (plaintiff) in each case.

ALCORN, C. J. We are confronted with two appeals by the defendants from judgments awarding damages to the plaintiff in two cases which were tried together. The appeals have been consolidated for presentation to this court. In each action the plaintiff sought the recovery of both compensatory and exemplary damages from the defendants jointly and severally based upon allegedly tortious acts committed in the course of an illegal strike. As the cases have been presented in the trial court and here, four different defendants representing three different union organizational levels are involved. One case relates to a strike which took place at the plaintiff's Pratt & Whitney Divi-

sion factories in East Hartford and Manchester, Connecticut. The other case relates to a simultaneous strike at the plaintiff's Hamilton Standard Division factories in Windsor Locks and Broad Brook, Connecticut. The top level of union organization involved is the defendant International Association of Machinists, hereinafter referred to as International. The next in union jurisdictional authority under International is the defendant Aeronautical Industrial District Lodge No. 91, hereinafter referred to as District 91. International and District 91 are defendants in both cases. At the bottom of International's union organization are the defendant Industrial Aircraft Lodge 1746 of the International Association of Machinists, hereinafter called Lodge 1746, and Industrial Aircraft Lodge 743 of the International Association of Machinists, hereinafter called Lodge 743. Members of Lodge 1746 were employed at the plaintiff's East Hartford and Manchester factories and Lodge 1746 was a defendant, along with International and District 91, in the action involving the strike at those plants. Members of Lodge 743 were employed at the plantiff's Windsor Locks and Broad Brook factories and Lodge 743 was a defendant, along with International and District 91, in the action involving the strike at those plants.

The defendants in each case filed identical pleas in abatement attacking the court's jurisdiction; the plaintiff demurred, and the court sustained the demurrers. The defendants in each case filed identical demurrers to the relief sought and the demurrers were overruled. The issues raised by these pleadings require no individual discussion because they are encompassed within the principal issues on this appeal. Following other preliminary pleading the issues were closed, trial was had first on the issue of liability and, subsequently, on the issue of damages. Judgment was rendered on November 26, 1968, that the plaintiff recover, in the case involving the strike in East Hartford and Manchester, damages of $1,369,725.25 with interest from August 12, 1960, exemplary damages of $197,333.33

and costs of $739.90; and, in the case involving the strike at Windsor Locks and Broad Brook, damages of $88,662 with interest from August 12, 1960, exemplary damages of $98,666.67 and costs of $241.70.

The court's finding, embraced in 866 numbered paragraphs covering 247 printed pages of the record is the subject of a massive attack by the defendants. It would prolong this opinion beyond all reason to discuss the errors assigned in the finding. Suffice it to say that they have been carefully examined and that no correction which would have a material bearing on the decisive issues is required.

The plaintiff has filed a cross appeal in which it too assigns error in the finding and also in the court's failure to find that the defendants authorized, participated in and ratified the acts complained of, and in its finding and award of damages. Here again the claims concerning the finding have been carefully examined and no correction which would have a material bearing on the decisive issues is found to be required. As in the case of the appeal, the claims of law and fact made in the cross appeal are disposed of in the ensuing discussion of the essential dispute between the parties.

The real issue raised by the appeal are: (1) whether the trial court had jurisdiction of the controversy, (2) whether the trial court erred in imposing liability on the defendants, and (3) whether the trial court erred in assessing damages. We will discuss those issues in that order.

I

Based on the doctrine of federal preemption, the defendants assign error in the court's refusal to dismiss both actions on jurisdictional grounds. There is no denying the fact that the jurisdiction of the state courts over labor disputes has been greatly restricted by the passage of the Labor Management Relations Act, 1947, and the establishment of the Labor Management Relations Board. The

complaints in these actions alleged in substance, however, that, while the plaintiff was negotiating collective bargaining agreements with Lodge 1746 and Lodge 743, all of the defendants joined in concerted and unlawful mass picketing, personal violence, invective and intimidation with the wilful and malicious purpose of coercing and preventing persons from entering the plaintiff's premises as a result of which the plaintiff suffered severe financial damage. It is well established that state courts have jurisdiction over such tort actions. *United Mine Workers* v. *Gibbs,* 383 U.S. 715, 721, 729, 86 S. Ct. 1130, 16 L. Ed. 2d 218; *San Diego Building Trades Council* v. *Garmon,* 359 U.S. 236, 247, 79 S. Ct. 773, 3 L. Ed. 2d 775; *United Automobile Workers* v. *Russell,* 356 U.S. 634, 635, 646, 78 S. Ct. 932, 2 L. Ed. 2d 1030; *United Construction Workers* v. *Laburnum Construction Corporation,* 347 U.S. 656, 657, 74 S. Ct. 833, 98 L. Ed. 1025. The claim of the defendants that the court lacked jurisdiction is without merit.

The defendants also attacked the court's jurisdiction on the ground that "federal law prohibits employers from using state court damage suits, predicated on strike misconduct, as 'weapons of economic coercion' ", relying on an observation made in *Linn* v. *United Plant Guard Workers,* 383 U.S. 53, 64, 86 S. Ct. 657, 15 L. Ed. 2d 582. The assertion of the accepted right to bring a state court action for damages arising from tortious conduct, as in the present cases, does not come within the ambit of the proposition stated even if the case relied on supported it.

The defendants' claims that the actions are barred by waiver, estoppel and condonation are completely without merit and do not require discussion.

II

We turn, then to the question of the correctness of the trial court's conclusion that liability could properly be imposed on the defendants for the tortious acts complained of. Since these acts occurred in the course of a labor

dispute, § 31-114 of the General Statutes becomes pertinent. The statute is printed in the footnote.[1] That statute, in substance, provides that liability cannot be imposed on organizations such as the defendants, participating or interested in a labor dispute, for the unlawful acts of its individual officers, members or agents except upon proof of (1) actual participation in, (2) actual authorization of, or (3) ratification of those acts by the defendants.

The plaintiff invokes the doctrine of respondeat superior under the common law of agency. Its argument is, in the first place, that, assuming that § 31-114 applies to cases such as the present, the statute did not do away with the common-law rules of agency and, secondly, in effect, that common-law rules of agency apply in these cases because § 31-114 does not apply.

There is no legislative history available to aid us in determining the extent to which, if at all, the General Assembly intended § 31-114 to displace the rules of agency in the case of labor unions involved in labor disputes. In *Benoit* v. *Amalgamated Local 299,* 150 Conn. 266, 274, 188 A.2d 499, however, we said that the language of § 31-114 is so similar to the language of § 6, of the Norris-LaGuardia Act (47 Stat. 71, § 6, 29 U.S.C. § 106)[2] that the construction

[1] "Sec. 31-114. RESPONSIBILITY FOR UNLAWFUL ACTS. No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute, shall be held responsible or liable in any court for the unlawful acts of individual officers, members or agents, except upon proof of actual participation in, or actual authorization of, such acts, or ratification of such acts after actual knowledge thereof."

[2] "[47 Stat. 71, § 6, 29 U.S.C. § 106] No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute, shall be held responsible or liable in any court of the United States for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof."

placed upon the latter by the United States Supreme Court is particularly pertinent in our construction of § 31-114.

We are persuaded by the reasoning and conclusions in cases construing § 6 of the Norris-LaGuardia Act that the liability of these defendants is to be determined by the application of § 31-114 of our General Statutes and that the common-law rules of agency are pertinent to § 31-114 only as an aid to determining actual participation in, actual authorization of, or ratification of the acts complained of. In other words, we believe that while a labor union which could properly be held to be liable under § 31-114 would probably also be liable under agency principles, nevertheless liability under common-law agency rules would not necessarily create liability under § 31-114.

The legislative history of § 6 of the Norris-LaGuardia Act, which we consider as somewhat of a twin to our own § 31-114, was reviewed in *United Brotherhood of Carpenters v. United States,* 330 U.S. 395, 67 S. Ct. 775, 91 L. Ed. 973. In that case the court said (p. 403): "We need not determine whether § 6 [of the Norris-LaGuardia Act] should be called a rule of evidence or one that changes the substantive law of agency. We hold that its purpose and effect was to relieve organizatioins, whether of labor or capital, and members of those organizations from liability for damages or imputation of guilt for lawless acts done in labor disputes by some individual officers or members of the organization, without clear proof that the organization or member charged with responsibility for the offense actually participated, gave prior authorization, or ratified such acts after actual knowledge of their perpetration." The court went on to state (p. 406): "We hold, therefore, that 'authorization' as used in § 6 means something different from corporate criminal responsibility for the acts of officers and agents in the course or scope of employment. We are of the opinion that the requirement of 'authorization' restricts the responsibility or liability in labor disputes of employer or employee associations, organizations or their members for unlawful acts of the officers or members of those associations or organizations, although such officers or members are acting within the scope of their general authority as such officers or members, to those associations, organizations or their officers or members who actually participate in the unlawful acts, except upon clear proof that the particular act charged, or acts generally of that type and quality, had been expressly authorized, or necessarily followed from a granted authority, by the association or non-participating member sought to be charged or was subsequently ratified by such association, organization or member after actual knowledge of its occurrence."

Congress thereafter enacted the Labor Management Relations Act (61 Stat. 136, 29 U.S.C. § 141), providing a statutory right of action for money damages in certain classes of labor disputes. 61 Stat. 159, § 303 (b), 29 U.S.C. § 187 (b). Section 303 of that Act was compared with § 6 of the Norris-LaGuardia Act in *United Mine Workers v. Gibbs,* 383 U.S. 715, 86 S. Ct. 1130, 16 L. Ed. 2d 218, in which the court stated (p. 736) that "the responsibility of a union for the acts of its members and officers [under § 303] is to be measured by reference to ordinary doctrines of agency, rather tnan the more stringent standards of § 6." See also *Riverside Coal Co.* v. *United Mine Workers,* 410 F.2d 267, 270 (6th Cir.); note, 63 Harv L. Rev. 1035, 1039.

Thus it appears that the United States Supreme Court construes common-law rules of agency to be applicable in actions under § 303 of the Labor Management Relations Act but not under the stricter requirements of § 6 of the Norris-LaGuardia Act, of which our § 31-114 is the counterpart. The plaintiff has overlooked this distinction in relying on several federal decisions in which neither § 6 of the Norris-LaGuardia Act nor a state statute like § 31-114 was being considered.

We turn, then, to the specific question of the liability of the defendants, or any of them, under § 31-114. This involves consideration of the meaning of "actual participation", "actual authorization" and "ratification". We believe that the repetition of the word *actual* is of particular significance. Of course, as was mentioned in *Benoit* v. *Amalgamated Local 299,* 150 Conn. 266, 273, 188 A.2d 499, organizations such as these defendants can act only through the instrumentality of individuals. Likewise, it is generally understood that designated officers of such organizations are clothed with a general authority commonly accepted as incidental to the office held. We conclude that, in requiring *actual* authorization in order to impose liability, it is the intent expressed in § 31-114 to require more than the agency rules of respondeat superior and more than the general authority with which an officer of the organization is clothed by virtue of his office. We subscribe to the proposition that the statute requires proof by the plaintiff that the acts complained of were either expressly authorized by the organization to be charged or were such that they flowed from that authorization. *United Brotherhood of Carpenters* v. *United States,* 330 U.S. 395, 67 S.Ct. 775, 91 L.Ed. 973; *United Mine Workers* v. *Gibbs,* supra, 738-39.

The same limitations must be held to apply to ratification. The proof must be of a ratification knowingly made in express and direct acts or terms of assent to the acts complained of by the organization to be charged. Implied ratification such as the law of agency presumes from the acts of a principal is not sufficient. "There can be no rigid requirement that a union affirmatively disavow such unlawful acts as may previously have occurred. . . . What is required is proof, either that the union approved the violence which occurred, or that it participated actively or by knowing tolerance in further acts which were in themselves actionable under state law or intentionally drew upon the previous violence for their force." *United Mine Workers* v. *Gibbs,* supra, 739.

When we come to the element of participation, we conclude that if representatives of the organization to be charged are proved to have actually taken part in the illegal acts complained of then the organization can be held liable for those acts depending upon the number and status of the persons participating and the extent of the organization's knowledge of and power to control their actions. In applying this rule, care must be taken in cases such as those before us to treat the individuals involved in their proper relationship. We believe that, to the extent that the liability of one organizational level of the union is predicated in part on the acts of members or officers of another organizational level, knowledge of those acts by the organization sought to be charged and its authority and ability to control those acts is relevant to the question of the organization's liability.

Applying the foregoing principles to the material facts found by the trial court, it is our conclusion that, while a case may arguably be made for the liability of these defendants on the ground of ratification, liability should be made to rest on the ground of actual participation in the illegal or tortious acts complained of.

Summarizing, as briefly as we are able, the voluminous facts found by the trial court, and reciting only those which we consider to be material to our decision and not subject to correction, the picture presented is as follows. The president of International was Albert J. Hayes. A vice-president of International was Fred Coonley, who was responsible for the geographical area in which the plaintiff's plants were situated. Richard L. Thurer was International's representative assigned to supervise District 91 and Lodges 1746 and 743. District 91 had administrative control over Lodges 1746 and 743. District 91 and Lodges 1746 and 743 were affiliated with International. John K. Main was senior business representative, and George Cope, John R. Sullivan and Robert Nelson were business representatives of District 91. Cope was assigned to service

Lodge 1746 and Sullivan was assigned to service Lodge 743. Raymond Jutras and Robert Davis were district organizers for District 91. David Fraser was president and William Stewart was vice-president of Lodge 1746. Butler J. Seedman was president and Edward Batchelder was vice-president of Lodge 743. Lodges 1746 and 743 represented bargaining unit employees of the plaintiff.

The plaintiff had two collective bargaining agreements with Lodge 1746 which terminated on December 4, 1959. The plaintiff had collective bargaining agreements with Lodge 743 which expired on April 21, 1960. Bargaining efforts on the agreements were proceeding unsuccessfully. Prior to said dates, namely, on November 30, 1959, Coonley and another International vice-president met in Hartford with Thurer, Fraser and Seedman and discussed plans for a strike. On April 10, 1960, at a meeting of the members of Lodge 1746, Jutras reported that he had been assigned "to start a future program against" the plaintiff; that he had visited International's local lodge at the Republic Aviation Corporation, "for suggestions as to how to stage a successful strike"; that if they struck they must fight and fight hard and they would need hundreds of pickets, and also attorneys to fight injunctions. On April 11, 1960, at a meeting of District 91 attended by Main, Cope, Nelson, Davis, Sullivan, officers of District 91, and delegates from Lodges 1746 and 743, Jutras reported that he had been assigned to lay out machinery for strike action in Lodges 1746 and 743, that "we can get experienced help from Grand Lodge to train and help our membership", that he had visited International's local lodge at Republic Aviation, that Republic was "in the same class" as United, and that he had "learned much" at Republic. At the same meeting, Cope reported that District 91 was arranging for Hayes, president of International, to address a mass meeting of the members of Lodges 1746 and 743 on May 22, 1960, the meeting to be coordinated by vice-president Coonley. There had been violence in the Republic Aviation

strike which had been considered a "precedent-setting victory" for International. The strike at Republic Aviation had been under Coonley's jurisdiction, and Joseph Curran had worked there under Coonley's supervision. Curran had been International's representative assigned to International's local union which struck against Republic Aviation. District 91 requested Coonley to assign Curran to address 409 picket captains from Lodges 1746 and 743 concerning their strike duties, and he did so on May 15, 1960. Main, as senior business representative of District 91, was in charge of the strike at the plaintiff's plants and had the function of obtaining the release of pickets who were arrested. Jutras was his assistant and was to coordinate the activities of the other business representatives and district organizers. Cope and Nelson were assigned to supervise activities at the gates at the plaintiff's East Hartford plant, and Cope's intention was to block the gates so that employees would be unable to enter. Davis' assignment was to keep the gates manned by pickets.

A mass meeting, supervised by Coonley, was held as scheduled at the Bushnell Memorial Hall on Sunday, May 22, 1960, which was addressed by Hayes, president of International. The next day Lodges 1746 and 743 voted to strike. Direct responsibility for conducting the strike at the plaintiff's plants was delegated by International to vice-president Coonley and Thurer, International's representative, although such a delegation was not in accordance with International's usual policy. On May 25, 1960, Lodges 1746 and 743 applied to International for strike sanctions, and on June 2, International granted the sanctions. On June 8, 1960, the strike commenced at the plaintiff's East Hartford and Manchester plants about 9 a.m. and at the plaintiff's Windsor Locks and Broad Brook plants at about 9:55 a.m.

From June 8 through June 13, 1960, strikers marched by the hundreds, shoulder to shoulder, at the gates of the East Hartford plant, massed at the gates and blocked vehicles

containing employees attempting to enter or leave, physically attacked employees attempting to enter or leave in automobiles or on foot, made contemptuous and threatening gestures to employees, shouted profanities, obscenities and threats of physical harm, shoved, kicked, pushed, slapped, and scratched employees, and broke mirrors and radio antennas and windows of automobiles attempting to enter or leave the plant. The police were compelled to push strikers forcibly aside in order to clear passageways for vehicles entering or leaving the plant. Hundreds of automobiles containing workers turned away. The police attempting to control activities were shoved against and onto the hoods of automobiles. Nails, tacks and other sharp objects were strewn on the road surface. The occupants of automobiles and pedestrians were spat at. The registration numbers of automobiles and the identity of occupants of vehicles were ostentatiously noted, and vehicles and their occupants were photographed. The photographs were posted on the bulletin board at 1746's lodge hall to intimidate employees so that they would not go to work. Mirrors were used to reflect sunlight into the lenses of cameras which the plaintiff attempted to use to record pictures of the activities. The result was that at the gates of the East Hartford plant traffic was snarled and blocked for many blocks. The aforementioned activities were participated in by thousands of members and many of the stewards, picket captains and committeemen of Lodge 1746. Fraser, the president, and Stewart the vice-president of Lodge 1746, Nelson, the business representative of District 91, Cope, the business representative of District 91, Jutras, district organizer of District 91, and Thurer, International's representative, all participated personally in the activities described. Thurer reported daily by telephone to Coonley as to what was going on, and Coonley regularly came to Hartford during the strike to meet with Thurer. International's representatives G. Poulin, G. Page and A. Giglio were also present at or near the entrance to the plaintiff's East Hartford plant from June 8 through June 11.

From June 8 through June 13, the same tactics were employed at the plaintiff's Windsor Locks plant, Broad Brook plant and Manchester plant. More than 1000 members, and many stewards, committeemen and officers of Lodge 743 participated in the activities at the Windsor Locks and Broad Brook plants. Seedman, president, and Batchelder, vice-president, of Lodge 743 as well as vice-president William Merrigan and Sullivan, business representative of District 91, participated personally. Special representative James D. Moore and auditor Benner of International along with Thurer, Symington, Page and Poulin, all International representatives, were present at the entrances of the Windsor Locks and Broad Brook plants occasionally. The strike activities of Lodges 1746 and 743 were so similar as to indicate a concert of activities.

The plaintiff instituted injunction actions in the Superior Court to restrain the mass picketing, violence and other illegal activities, and an order to show cause was issued returnable June 13, 1960. The general counsel of International came to Hartford and, after conferences, stipulations were entered into in substance enjoining the defendants from engaging in mass picketing, interfering by force, violence or intimidation with employees and limiting the number of pickets at the plaintiff's gates. Another action was brought by the regional director of the Labor Management Relations Board in the United States District Court to enjoin International and Lodges 1746 and 743 from the unlawful activities taking place at the plaintiff's plants and, on June 16, a stipulation in substance similar to that issued in the Superior Court was entered into.

Following the issuance of the injunctions, the strike continued until, on August 8 and 9, Lodge 743 and Lodge 1746, respectively, voted to end it. Between June 16 and August 8 and 9, however, the violence at the gates of the several plants materially decreased. The mass picketing

ceased, but picketing in limited numbers continued. Pickets, however, still obstructed vehicles until required to move by the police, struck, coerced and threatened persons, and recorded registration numbers of automobiles and the names of the occupants. Trucks of the plaintiff's suppliers had difficulty in entering the plants or had to turn away, and private contractors were prevented from entering. District organizer Davis threatened an employee with bodily harm if she continued working. Thurer, International's representative, threatened bodily injury to the plaintiff's photographer.

During the strike International's general counsel came to Hartford and recommended that all of International's representatives and district organizers assigned to deal with the plaintiff be suspended but International took no action to suspend them. There is nothing in the finding to indicate that, until the stipulation in the injunction actions, any defendant made any effort to restrict the activities at the plaintiff's plants.

In discussing "actual authorization" in *United Brotherhood of Carpenters* v. *United States,* 330 U.S. 395, 409, 67 S. Ct. 775, 91 L. Ed. 973, the court said: "There is no implication in what we have said that an association or organization in circumstances covered by § 6 [of the Norris-LaGuardia Act] must give explicit authority to its officers or agents to violate in a labor controversy the Sherman Act or any other law or to give antecedent approval to any act that its officers may do." We think an analogous rule applies under § 31-114 with respect to "actual participation" and that explicit authority to participate need not be proved in order to establish the organization's participation. The court found the activity which we have summarized to be tortious, as it obviously was. It further found that those acts followed concerted preliminary planning after study of the violence indulged in by International's local union in the Republic Aviation strike, which International had considered a "precedent-

setting victory". From June 8 to 13, large numbers of members and officers of the several defendants actively participated in the extreme violence which took place at the several plants, many of the officers who participated held positions of the highest authority and responsibility in the several organizations, and, although they were obviously fully aware of what was going on, no effort whatever appears to have been made by any defendant to end or restrict the activity prior to the stipulations in connection with the injunction actions. Thereafter, acts of the same sort and by some of the same persons continued at the various plants, although in a lesser degree, until the strike ended in August. Even during this latter period there appears to have been no effort exerted by any defendant to end the violence completely. The activity was reprehensible in the extreme and it is not to the credit of any of the defendants to attempt to assert as a shield that the actions complained of were those of individuals divorced from their sponsorship. The trial court was fully warranted in concluding that all of the defendants were liable for the acts which occurred at the various plants between June 8 and August 8 and 9, 1960, because of their actual participation in those acts. *Riverside Coal Co.* v. *United Mine Workers,* 410 F.2d 267, 272 (6th Cir.). In view of this conclusion, we see no need for further discussion of the subject of actual authorization or ratification.

Other vicious and lawless acts are found by the trial court to have been committed by individuals away from any of the plaintiff's premises. These are found to have been inflicted on employees of the plaintiff and to have consisted of burning and otherwise damaging automobiles, homes and outbuildings, flooding the cellars of homes, releasing the air from automobile tires, and harassment on the highways. The admission of the evidence concerning some of these acts was objected to by the defendants and is assigned as error. It is unnecesary to discuss these

assignments, and we have not recited these incidents as proven facts material to the issue of the defendants' liability for two reasons. In some instances, the evidence concerning some of the incidents consists of reports received by the plaintiff of acts done by unidentified persons. In other cases the evidence relates to acts which are not sufficiently shown to have been within the knowledge of any but the few persons concerned and thus not within the knowledge or control of the defendants. For these reasons we have concluded, without engaging in extended discussion of specific events, or rulings concerning the evidence relating to them, that the defendants are not shown to have participated within the meaning of § 31-114 in the acts, vicious and lawless as most of them were, which occurred other than at the gates or premises of the plaintiff's several plants and, consequently, are not liable for damages based upon those activities. To the extent that the court awarded damages arising from activities which occurred other than at the plaintiff's several plants we must find error.

III

The trial court rendered judgments in the two cases for the plaintiff to recover a total of $1,754,387.25 in compensatory and exemplary damages. Both the plaintiff and the defendants assign error in the damages awarded. In assessing compensatory damages the trial court awarded the plaintiff a sum attributable to losses caused by the involuntary absence of employees due to fear or compulsion resulting from the tortious acts which were committed both at the plaintiff's premises and elsewhere. We have concluded that the court erred in finding the defendants liable for tortious acts which were committed away from the plaintiff's premises. Consequently, the case must be remanded for a new trial on the damage issue. We therefore do not discuss in detail the plaintiff's and the defendants' assignments of error concerning the various

aspects of the award of compensatory damages. We shall limit our discussion to matters which may serve to aid the trial court on the remand.

The defendants claim, in effect, that the court erred in allowing a recovery for losses which the plaintiff would inevitably have sustained from lawful strike activity. In support of this claim they correctly assert that a state court may properly award damages only for losses arising from tortious conduct and not for losses arising from protected strike activity. See *United Mine Workers* v. *Gibbs*, 383 U.S. 715, 729-30, 86 S. Ct. 1130, 16 L. Ed. 2d 218. The short answer is that the court did limit its award only to damages arising from tortious acts.

The plaintiff claims in its cross appeal that the trial court erred in failing to award all of the losses incurred by the plaintiff as a result of the strike on the ground that tortious strike conduct was so intertwined with lawful strike conduct as to preclude apportionment. The trial court overruled this claim and the plaintiff assigns error in this ruling. The plaintiff relies principally on *Milk Wagon Drivers Union* v. *Meadowmoor Dairies, Inc.*, 312 U.S. 287, 61 S. Ct. 552, 85 L. Ed. 836, as interpreted in *United Mine Workers* v. *Gibbs*, supra, 731. *Meadowmoor* was an injunction action in which the court held that a state court could properly enjoin picketing in itself peaceful which was contemporaneously enmeshed with concededly outlawed violent conduct. Subsequently, in *Youngdahl* v. *Rainfair, Inc.*, 355 U.S. 131, 139, 78 S. Ct. 206, 2 L. Ed. 2d 151, the court held that a state court could not enjoin both peaceful picketing and violent picketing, apparently treating the case before it as differing from *Meadowmoor* in that a pattern of violence was not established which would inevitably reappear if peaceful picketing were resumed. In *Teamsters Union* v. *Morton*, 377 U.S. 252, 84 S. Ct. 1253, 12 L. Ed. 2d 280, the court appears in effect to have applied the *Youngdahl* principle and held that damages could not be awarded for lawful strike activity although

unlawful acts were indulged in by the union elsewhere. And in *United Mine Workers* v. *Gibbs,* supra, the court, in referring to *Meadowmoor,* said (p. 732): "Where the consequences of peaceful and violent conduct are separable, however, it is clear that recovery may be had only for the latter." Here again, the answer is that, in the cases before us, the court was able to determine damages based only on the tortious acts.

The plaintiff has also assigned error in the court's overruling of its claim that the burden was on the defendants to establish the allocation of losses between peaceful strike activity and unlawful strike activity. The ruling was correct. It was the plaintiff's burden to prove the damages which it claimed had resulted from the tortious acts complained of. See *Grzybowski* v. *Connecticut Co.,* 116 Conn. 292, 294, 164 A. 632.

In assessing compensatory damages the trial court took as the measure of damages the monetary value of the plaintiff's losses due to the involuntary absence of employees because of fear and coercion as a result of the illegal tortious acts which occurred. The formula used by the court to determine such damages was to arrive at (1) the monetary value of the total strike loss sustained by the plaintiff because of a deprivation of a portion of its productive labor force, (2) how long the strike would have lasted absent the illegal tortious acts, and (3) the amount of absence on the part of employees which was involuntary because of fear and coercion resulting from illegal tortious acts.

The trial court first computed the monetary value of the total damages sustained by the plaintiff because of its being deprived of a portion of its productive labor force at the Pratt & Whitney Division plants and at the Hamilton Standard Division plants. The figures arrived at were based primarily on two elements: (1) excessive manufacturing costs due to the diminution of the labor

force, and (2) unabsorbed fixed overhead expenses, referred to as "wasted overhead", due to diminution of the labor force.

The court found that the plaintiff's standard accounting system afforded an adequate and reasonable basis for computing the plaintiff's excessive manufacturing costs and wasted overhead due to the man-days of labor lost. The defendants attack this conclusion. It was enough that the court relied on evidence which showed "the extent of . . . [this item] as a matter of just and reasonable inference, although the result be only approximate." *Story Parchment Co.* v. *Paterson Parchment Paper Co.,* 282 U.S. 555, 563, 51 S. Ct. 248, 75 L. Ed. 544; *Ball* v. *T. J. Pardy Construction Co.,* 108 Conn. 549, 551, 143 A. 855. For the same reason, it was proper for the court to rely on evidence concerning the plaintiff's manufacturing costs for the period from January to May, 1960, as a base for computing the plaintiff's excess manufacturing costs from June to August, 1960. Here again the defendants' claim of lack of exactness fails. In computing the excessive manufacturing costs the court included costs for corrective work, training, spoiled work, labor efficiency variance, premiums paid for overtime work made necessary by absent employees, and, in the case of Hamilton Standard, the cost of excessive "make or buy conversion". The defendants contested all these items. We believe, however, that the trial court properly computed excessive manufacturing costs. We believe, also, that the costs of wasted overhead as found by the trial court is supported by the evidence. In determining wasted overhead on remand, however, the overtime hours worked during the strike should be taken into account. See *Sheet Metal Workers International Assn., Local 223* v. *Atlas Sheet Metal Co.,* 384 F.2d 101, 110 (5th Cir.).

The defendants assign error in the court's ruling denying their offer to prove that the plaintiff had been reimbursed for its losses through the terms of government contracts.

The claim is without merit. Under the collateral source rule the evidence would be inadmissible. See *Lashin* v. *Corcoran,* 146 Conn. 512, 515, 152 A.2d 639. The basis of our well-established collateral source rule is that a wrongdoer shall not benefit from a windfall from an outside source. That rule is applicable in this as in any tort case.

Having arrived at a figure representing the value of the total strike damage sustained by the plaintiff due to deprivation of a portion of its productive labor force, the court next proceeded to determine the portion of this figure which represented the loss directly due to the involuntary absence of employees because of fear and coercion as a result of the illegal tortious activities which had occurred. The court found that if the violence had not occurred, the strike would not have lasted beyond three weeks at the Pratt & Whitney plants and not more than six weeks at the Hamilton Standard plants. The court then went on to find the total number of employees at each plant prior to the strike, the number who reported to work and the number who left early on the first day of the strike, the percentage of those who failed to report for work during the first weeks of the strike because of fear or because they were unable to enter, and the percentage of involuntary absentees at the end of the strike. The court concluded that the defendants were not liable for damages for loss of man hours for the first three weeks of the strike at the Pratt & Whitney plants and for the first six weeks at Hamilton Standard; it found the mean percentage of employees who stayed out of work for the remaining period due to fear; and it applied that percentage to the plaintiff's total loss for that period and so arrived at the damages awarded.

The trial court's findings as to how long the strike would have lasted at the Pratt & Whitney plants and at the Hamilton Standard plants were based on the testimony of a labor economist offered as a witness by the plaintiff,

who gave his opinion, as an expert, as to how long the strike would have lasted at the plaintiff's plants had there been no violence. This testimony was admitted over the defendants' objection and the court's action in admitting the testimony is assigned as error by the defendants. The defendants introduced evidence through an expert witness who gave it as his opinion that it was impossible to predict the length of a nonviolent strike. The trial court specifically found that it did not believe this witness, and this is assigned as error by the defendants. We believe that the opinion of the plaintiff's witness as to how long the strike would have lasted, absent violence, was too speculative to be accorded significant weight and is not a sufficient basis for the court's finding concerning the length of the strike if violence had not occurred. See *Stephanofsky* v. *Hill,* 136 Conn. 379, 384-85, 71 A.2d 560.

It was not necessary for the trial court to attempt to estimate the length of time a nonviolent strike would have lasted. It had only to determine what damage resulted from the tortious acts. Whenever loss results to a party naturally and directly from the tortious or illegal act of another, the loss is the proper subject of judicial relief by compensation in damages. *Division 163* v. *Connecticut Co.,* 148 Conn. 563, 569, 173 A.2d 130; *Mourison* v. *Hansen,* 128 Conn. 62, 66, 20 A.2d 84. There must be a causal relation established between the tort and the damage sustained. *Robinson* v. *Southern New England Telephone* Co., 140 Conn. 414, 418, 101 A.2d 491. The trier is concerned with reasonable probabilities. *Sheiman* v. *Sheiman,* 143 Conn. 222, 225, 121 A.2d 285; *Boland* v. *Vanderbilt,* 140 Conn. 520, 525, 102 A.2d 362. And the basic aim is to compensate the plaintiff for the loss caused by the tortious conduct so far as money can do so. *Youngset, Inc.* v. *Five City Plaza, Inc.,* 156 Conn. 22, 27, 237 A.2d 366. "Where a defendant has by his wrongful conduct made the calculation of damages difficult, he will not be heard to urge such difficulty as a reason for not assessing

by approximation." *Crowell* v. *Palmer,* 134 Conn. 502, 510, 58 A.2d 729. "From the very nature of the situation, the amount of loss cannot be proved with exactitude and all that can be required is that the evidence, with such certainty as the nature of the particular case may permit, lay a foundation which will enable the trier to make a fair and reasonable estimate." *Ball* v. *T. J. Pardy Construction Co.,* 108 Conn. 549, 551, 143 A. 855; *Collens* v. *New Canaan Water Co.,* 155 Conn. 477, 490, 234 A.2d 825; *Humphrys* v. *Beach,* 149 Conn. 14, 21, 175 A.2d 363.

Each of the actions at issue here sought damages caused by the defendants' "wilful and malicious" tortious conduct. Clearly enough the defendants had the full right to stage a strike but they had no right to participate, as the evidence established that they did, in violent and unlawful acts at the gates of and on the premises of the plaintiff's several plants. Those acts occurred from June 8 to August 8 and 9, 1960. Their effect was to reduce the number of employees who would normally have been expected to report for work and this caused substantial loss to the plaintiff. For the damage proved to have been caused to the plaintiff by those acts, the defendants should be held liable under the established rules of tort liability. In computing the monetary value of the plaintiff's strike losses at the Pratt & Whitney Division plants and Hamilton Standard Division plants due to the involuntary absence of employees because of fear and coercion as a result of the illegal tortious activities which occurred at these plants, the trial court should, on remand, determine the amount of absence from the Pratt & Whitney Division plants which was involuntary as the result of the illegal tortious activities which occurred at those plants from June 8 to August 8 and 9, 1960, and the amount of absence from the Hamilton Standard Division plants which was involuntary as a result of the illegal tortious activities which occurred at those plants from June 8 to August 8 and 9, 1960. On the basis of the figures representing the

monetary value of the total strike losses sustained by the plaintiff at each of these divisions due to the loss of productive labor and the figures representing the aforementioned amount of involuntary absence the damage to which the plaintiff is entitled may be determined.

There remains the question of whether the trial court properly determined the amount of absence from the Pratt & Whitney Division plants and the Hamilton Standard Division plants which was involuntary. The court made its determination in this regard mainly on the basis of the testimony of the aforementioned labor economist who was permitted, over the defendants' objection, to state his opinion as to the percentage of the plaintiff's employees who stayed away from their employment involuntarily, and the reception of this evidence by the court is assigned as error by the defendants. While expert opinion would be relevant provided the court accorded it persuasive weight as was done in these cases, other methods of determining the element of involuntary absence of equal or greater weight might be resorted to such as a representative sampling of employees who refrained from work. The evidence to be relied on for arriving at a reasonable approximation is for the court to decide. In determining the amount of involuntary absence, however, the trial court, as we have already stated, improperly took into account absence due to fear engendered by violence and illegal acts which took place away from the plaintiff's premises as well as absence due to fear engendered by violence and illegal acts which took place at the plaintiff's plants. Only the involuntary absences due to the violence and illegal acts at the plants should be considered.

The plaintiff alleged, and the court found, that tortious illegal acts which occurred during the strike were willful and malicious. Under these circumstances, the plaintiff was entitled to recover punitive or exemplary damages in an amount which would serve to compensate the plaintiff

to the extent of its expenses of litigation less taxable costs. *Collens* v. *New Canaan Water Co.*, 155 Conn. 477, 488, 234 A.2d 825; *Triangle Sheet Metal Works* v. *Silver*, 154 Conn. 116, 127, 222 A.2d 220. The court found and awarded the legal fees and expenses exclusive of taxable costs incurred by the plaintiff in these cases including attorneys fees for successfully defending a case brought by the defendants in the federal courts seeking to enjoin the prosecution of these cases. This award was proper.

The trial court awarded interest on the sum determined as compensatory damages in each case from August 12, 1960. The defendants assign error in this action of the court. The defendants argue, however, that, since the plaintiff did not commence these actions until almost three years after August 12, 1960, interest should have been awarded only from the date of the judgment because the plaintiff was responsible for the delay. The plaintiff counters with the argument that after the actions were brought the preliminary pleading indulged in by the defendants caused delay in getting the cases to judgment.

Both arguments miss the mark for we believe the court erred in the award of interest from August 12, 1960, because it was based on an unliquidated claim. We have uniformly held interest to be allowable from the date of injury on damages resulting from tortious injury to property. *Wells Laundry & Linen Supply Co.* v. *Acme Fast Freight, Inc.*, 138 Conn. 458, 463, 85 A.2d 907; *New York, N.H. & H.R. Co.* v. *Ansonia Land & Water Power Co.*, 72 Conn. 703, 705, 46 A. 157; *Regan* v. *New York & N.E.R. Co.*, 60 Conn. 124, 142, 22 A. 503. As the decisions indicate, however, such an award is limited to cases in which the damage is of a sort which could reasonably be ascertained by due inquiry and investigation on the date from which interest is awarded. Our previous discussion makes clear that the compensatory damages awarded in these cases is not of that description. Interest should have been awarded only from the date of judgments.

IV

The defendants' claim that these actions, having been brought in 1963 based upon events which occurred in 1960 are barred by the Statute of Limitations is without merit. The three-year Statute of Limitations, § 52-577, is applicable to all tort actions other than those actions carved out of § 52-577 and enumerated in § 52-584 or another section. *Collens* v. *New Canaan Water Co.*, supra, 491.

None of the other claims of the parties merit any discussion.

For the foregoing reasons we conclude that both cases must be remanded to the Superior Court solely for the purpose of reassessing the compensatory damages in accordance with this opinion.

There is error in part, the judgment is affirmed in each case except as to the amount of compensatory damages with interest awarded and a new trial is ordered in each case limited to that issue.

In this opinion the other judges concurred.

SUPREME COURT
HARTFORD COUNTY

October Term, 1969

133884

UNITED AIRCRAFT CORPORATION

v.

INTERNATIONAL ASSOCIATION OF MACHINISTS

133885

UNITED AIRCRAFT CORPORATION

v.

INTERNATIONAL ASSOCIATION OF MACHINISTS

Defendants' Motion for Reargument

May 11, 1971.

The motion by the defendants to reargue is denied.

By the Court,

ALCORN
Chief Justice

SUPREME COURT OF CONNECTICUT
OFFICE OF THE REPORTER OF JUDICIAL DECISIONS

DONALD H. DOWLING
REPORTER OF JUDICIAL DECISIONS

BOX 1350
HARTFORD 06101

11 May 1971

Norman Zolot, Esq.
9 Washington Avenue
Hamden, Connecticut

John D. Fassett, Esq.
205 Church Street
New Haven, Connecticut

Re: *United Aircraft Corporation* v. *International Association of Machinists, et al.*, No. 6646

Gentlemen:

Please be advised that the opinion in the above-captioned matter has been amended.

The following paragraph . . .

> "The court found that the plaintiff had sustained substantial damage, but, as we have stated, the amount thereof must be recomputed because the court allowed the plaintiff nothing for acts which occurred in the period during which it found that a nonviolent strike might have lasted and did award damages arising from events which occurred off the plaintiff's premises. For the foregoing reasons we conclude that both cases must be remanded to the Superior Court solely for the purpose of reassessing the compensatory damages in acordance with this opinion." . . .

has been substituted for the first paragraph on page eleven, column one, of the Connecticut Law Journal (Vol. 32, No. 43) dated 27 April, 1971.

Very truly yours,

DONALD H. DOWLING
Donald H. Dowling

DHD:mhw

STATE OF CONNECTICUT
SUPREME COURT AT HARTFORD

First Tuesday of October 1969

No. 6646

No. 133884

UNITED AIRCRAFT CORPORATION, organized and existing under the laws of the State of Delaware, with its principal place of business in East Hartford, Connecticut

v.

INTERNATIONAL ASSOCIATION OF MACHINISTS, an unincorporated voluntary association with its principal office in Washington, D. C.;

AERONAUTICAL INDUSTRIAL DISTRICT LODGE No. 91, INTERNATIONAL ASSOCIATION OF MACHINISTS, an unincorporated voluntary association with its office in East Hartford, Connecticut; and

INDUSTRIAL AIRCRAFT LODGE 1746 of the INTERNATIONAL ASSOCIATION OF MACHINISTS, an unincorporated voluntary association with its principal office in East Hartford, Connecticut

No. 133885

UNITED AIRCRAFT CORPORATION, organized and existing under the laws of the State of Delaware, with its principal place of business in East Hartford, Connecticut

v.

INTERNATIONAL ASSOCIATION OF MACHINISTS, an unincorporated voluntary association with its principal office in Washington, D. C.;

AERONAUTICAL INDUSTRIAL DISTRICT LODGE No. 91, INTERNATIONAL ASSOCIATION OF MACHINISTS, an unincorporated voluntary association with its office in East Hartford, Connecticut; and

LODGE 743, INTERNATIONAL ASSOCIATION OF MACHINISTS, an unincorporated voluntary association with its principal office in Windsor Locks, Connecticut

Judgment

The above entitled matters were combined by stipulation approved by the court on December 4, 1968 for the purposes of appeal.

These appeals by the defendants from the judgments of the Superior Court in and for the county of Hartford were filed with the Clerk of said Court on the 4th day of December, 1968 and on the 12th day of December, 1968 the plaintiff filed its cross-appeals from said judgment, and said appeals came thence to the 15th day of September 1969 when the defendants filed their assignment of errors and to the 12th day of September 1969 when the plaintiff filed its assignment of errors, and thence to the 30th day of September 1969 when the defendants filed their additional assignment of errors, as may appear in the certified transcript of record on file in this court, and said appeals came thence to this Court at its term held on the first Tuesday of October 1969, and thence to the present term when the parties appeared and were fully heard.

And now this Court finds there is error in part.

Whereupon it is adjudged that the judgment is affirmed in each case except as to the amount of compensatory damages with interest awarded and a new trial is ordered in each case limited to that issue and that the defendants recover of the plaintiff costs taxed at $10,126.05, to be reduced by an amount equal to the cost of printing defendants exhibit 65 and plaintiff's exhibit CC, and that the plaintiff recover of the defendants costs taxed at $1418.30.

By the Court,

THOMAS H. ABRAHAM, *Clerk*

Date of Judgment April 27, 1971

Memorandum of Decision

These actions were originally instituted to recover damages for losses allegedly resulting from tortious conduct and willful and malicious acts committed by the defendants during a strike at the plaintiff's plants in East Hartford, Windsor Locks, and Broad Brook between June 8 and August 9, 1960. The actions were consolidated and tried to the court, Gaffney, J.

There are four different defendants representing three different local levels. In Docket No. 133884 the defendants are The International Association of Machinists, hereinafter referred to as International. The second defendant is Aeronautical Industrial District Lodge No. 91. The third defendant is Industrial Aircraft Lodge 1746. The members of Lodge 1746 were employed at the plaintiff's East Hartford and Manchester factories.

In Docket No. 133884 the aforementioned International and District No. 91 are defendants; the third defendant in that action being Industrial Aircraft Lodge 743, the members of which were employed at the plaintiff's Windsor Locks and Broad Brook factories.

The plaintiff in Docket # 133884 is hereinafter referred to as Pratt & Whitney. In Docket # 133885 the plaintiff is referred to as Hamilton Standard.

The trial court rendered judgment in favor of the plaintiff against the defendants in Docket # 133884 in the amount of $1,369,725.25 with interest from August 12, 1960. The trial court also rendered judgment in favor of the plaintiff in the amount of $88,662 with interest from August 12, 1960. The court also awarded exemplary damages in both cases in the total amount of $296,000 including costs and attorneys fees.

Both the plaintiff and the defendants appealed from these judgments. The Supreme Court in United Aircraft Corporation vs. International Association of Machinists

et al, 161 Conn. 79, found error in part and ordered a new trial.

With respect to the liability issue, the Supreme Court held that the defendants were not responsible for tortious conduct which occurred away from any of the plaintiff's several other plants and were hence not liable for damages based upon those activities. *Ibid.* 97. Liability, however, was affirmed against the defendants for tortious conduct and willful and malicious acts committed at the gates of and on the premises of the plaintiff's several plants at East Hartford and Windsor Locks and Broadbrook.

The Supreme Court also found error with respect to the compensatory damages rendered in favor of the plaintiff.

In the first instance, the Supreme Court determined that in computing the monetary value of the total damages sustained by the plaintiff during the strike by reason of loss of productivity, the court properly computed excessive manufacturing costs and the costs of wasted overhead. It held that on remand, overtime worked during the strike should be taken into account. *Ibid.* 101. It also determined that the plaintiff was entitled to recover damages for all tortious conduct committed by the defendants at the plant or on the premises of the plaintiff during the entire length of the strike and not as the trial court had done by eliminating a three-week period which the court had found would have been the normal length of the strike at the Pratt & Whitney plant and a like six-week period at the Hamilton Standard plant. *Ibid.* 103.

The award of exemplary damages was upheld by the Supreme Court but the award of interest was held to be error, since it could be computed only from the date of the judgments. In remanding the case the Supreme Court stated:

> The court found that the plaintiff had sustained substantial damage, but, as we have stated, the amount

thereof must be recomputed because the court allowed the plaintiff nothing for acts which occurred in the period during which it found that a nonviolent strike might have lasted and did award damages arising from events which occurred off the plaintiff's premises. For the foregoing reasons we conclude that both cases must be remanded to the Superior Court solely for the purpose of reassessing the compensatory damages in accordance with this opinion. There is error in part, the judgment is affirmed in each case except as to the amount of compensatory damages with interest awarded and a new trial is ordered in each case limited to that issue.

Ibid. 108.

In assessing compensatory damages in the prior trial, part of the formula used by the trial court to determine such damages was to arrive at the monetary value of the total strike loss sustained by the plaintiff because of deprivation of its productive labor force. *Ibid.* 100.

On appeal, the Supreme Court sustained the trial court's finding

> The trial court first computed the monetary value of the total damages sustained by the plaintiff because of its being deprived of a portion of its productive labor force at the Pratt & Whitney Division plants and at the Hamilton Standard Division plants. The figures arrived at were based primarily on two elements: (1) excessive manufacturing costs due to the diminution of the labor force and, (2) unabsorbed fixed overhead expenses, referred to as "wasted overhead," due to diminution of the labor force.
>
> *Ibid.* 100.

Although the defendants in their appeal contested all of these items, the Supreme Court held that the trial court had properly computed excessive manufacturing costs.

> We believe, however, that the trial court properly computed excessive manufacturing costs. We believe, also that the costs of wasted overhead as found by the trial court is supported by the evidence. In determining wasted overhead on remand, however, the overtime hours worked during the strike should be taken into account.
>
> *Ibid.* 101.

In the present trial, the plaintiff followed the same procedure. Plaintiff's exhibits H-1 and K-1, which I accept, represent a computation by the Comptroller of the plaintiff, Charles Preston, of the monetary value of the total damages sustained by the plaintiff because of its being deprived of a portion of its productive labor at the Pratt & Whitney plants and at the Hamilton Standard plants with proper allowance being made in determining wasted overhead as directed by the Supreme Court for overtime hours worked during the strike.

Exhibit H-1 computes the total damages in the Pratt & Whitney case incurred during the strike period as $4,149,151. Exhibit K-1 computes the total damages incurred during the strike period at the Hamilton Standard plant as $2,304,718. The defendant attacked many of these computations, renewing many of the objections which were heard by the Supreme Court at the original trial. A lengthy discussion of the defendant's objections would serve no purpose in this memorandum. I accept as credible the method of computing the damages based on excessive manufacturing cost and the costs of wasted overhead in both cases as set forth in plaintiff Exhibits H-1 and K-1.

There remains the question of course of arriving at the portion of these figures which represents the loss directly due to the involuntary absence of employees because of fear and coercion as a result of the illegal tortious activities which occurred at these plants. Based on the findings of the trial court, the Supreme Court stated:

> For the damage proved to have been caused to the plaintiff by those acts, the defendants should be held liable under the established rules of tort liability. In computing the monetary value of the plaintiff's strike losses at the Pratt & Whitney Division plants and Hamilton Standard Division plants due to the involuntary absence of employees because of fear and coercion as a result of the illegal, tortious activities which occurred at these plants, the trial court should, on remand, determine the amount of absence from the Pratt & Whitney Division plants which was involuntary as the result of the illegal, tortious activities which occurred at those plants from June 8 to August 8 and 9, 1960, and the amount of absence from the Hamilton Standard Division plants which was involuntary as a result of the illegal, tortious activities which occurred at those plants from June 8 to August 8 and 9, 1960. On the basis of the figures representing the monetary value of the total strike losses sustained by the plaintiff at each of these divisions due to the loss of productive labor and the figures representing the aforementioned amount of involuntary absence the damage to which the plaintiff is entitled may be determined.
>
> *Ibid.* 104, 105.

This determination occupied the greater portion of the trial in this case. Twenty-four days were required to complete the retrial. I accept it as facts the acts of tortious conduct set forth in the finding made by Judge Gaffney during the strike period at these plants. I did not regard it as within the scope of the remand for me to try the existence or non-existence of the tortious conduct at or about the plant or premises or gates of the plaintiff's plants. However, I did look at the films taken by the plaintiff at the gates of Pratt & Whitney, East Hartford plant as well as the Hamilton Standard plant in Windsor Locks during June 8, 9, and 13, 1960, largely to get a personal reaction to the extent of the violence.

The plaintiff offered as witnesses on this issue Dr. Herbert R. Northrop who is Professor of Industry and Chairman of the Department of Industry of the Wharton School of Finance and Commerce of the University of Pennsylvania. He was a Senior Hearing Officer with the War Labor Board during World War II. He had been an Industrial Relations Consultant for Ebasco Services, a large management consulting firm, Vice President for Industrial Relations for Penn-Texas Corporation and Employer Relations Consultant for General Electric Company. While with General Electric Company, he had chief staff responsibilities for seventy of the company's plants and 100,000 employees in all aspects of industrial and employee relations. He has published 150 articles in various professional and personal journals, and has written ten books. One of the books is a textbook entitled "Economics of Labor Relations" which is the most popular textbook in the field and is used at about 250 colleges and universities. He had written two articles and one book on the labor relations policies of General Electric Company which dealt with, among other things, General Electric's strike in the fall of 1960.

Morgan R. Mooney was Vice-President for Industrial Relations of United Aircraft Corporation at the time of the first trial. At the time of the strike in 1960, he was Personnel Director of United Aircraft Corporation, a post in which he acted as assistant or second in command to the Vice-President for Industrial Relations. From 1933 until 1935 he worked for the federal government as a labor compliance officer. He then became Deputy Labor Commis-

sioner in the Connecticut Department of Labor and Factory Inspection from 1935 to 1942. In that position he acted as Secretary of the State Board of Mediation and Arbitration and had the responsibility of attempting to mediate and settle labor disputes including strikes throughout the State of Connecticut. In that position Mooney made factual investigations of quite a large number of strikes, which investigation included facts about the company, its products, its management, the number of employees, the number in the bargaining unit, the union that represented the employees, the issues involved in the strike, and the positions of the union and the management with respect to each issue.

The defendants offered a group of eminent authorities in the field of labor, economics, social sciences, including psychology, as well as statistics. It was the defendants' position that the testimony of both Dr. Northrup and Mr. Mooney in quantifying the number of employees whose absence was involuntary because of fear and coercion as a result of the illegal tortious activities which occurred at the plants was entirely speculative and could be determined with no reasonable accuracy.

With respect to this issue the Supreme Court stated:

> There remains the question of whether the trial court properly determined the amount of absence from the Pratt & Whitney Division plants and the Hamilton Standard Division plants which was involuntary. The court made its determination in this regard mainly on the basis of the testimony of the aforementioned labor economist who was permitted over the defendants' objection, to state his opinion as to the percentage of the plaintiff's employees who stayed away from their employment involuntarily, and the reception of this evidence by the court is assigned as error by the defendants. While expert opinion would be relevant provided the court accorded it persuasive weight as

> was done in these cases, other methods of determining the element of involuntary absence of equal or greater weight might be resorted to such as a representative sampling of employees who refrained from work. The evidence to be relied on for arriving at a reasonable approximation is for the court to decide.
>
> *Ibid.* 105, 106.

I construe this language to mean that the testimony of Dr. Northrop and Mr. Mooney were admissible, and that it could be accorded persuasive weight if in the opinion of the trier it was entitled to it. The Supreme Court suggested that as stated above:

> other methods of determining the element of involuntary absence of equal or greater weight might be resorted to such as a representative sampling of employees who refrained from work. The evidence to be relied on for arriving at a reasonable approximation is for the court to decide.
>
> *Ibid.* 105, 106.

All of the defendants' experts agreed that it would have been impossible to have secured a representative sample based on any scientific methodology of conducting a poll at any time, subsequent to the strike, which would have any validity. All of them in substance claimed that there was no logic between the total number of people employed and the percentages that the plaintiff's experts came to.

135 employees gave oral testimony before me, including 113 employees at the Pratt & Whitney plant and 22 at the Hamilton Standard plant. By stipulation of the parties, the transcripts of the testimony of 63 employees (58 Pratt & Whitney and 5 Hamilton Standard) who had testified at the prior trial was admitted into evidence and in addition the transcripts of 10 other employees who testified at the prior trial and who were not available were admitted

of testimony by the undersigned over the defendants' objection. Thus, there was a total of 208 employees whose testimony was available with alleged claims that their absence was involuntary due to defendants' tortious acts at the premises.

The plaintiff does not claim that this constitutes a representative sample in a statistical sense or in the sense that such phrase is used for scientific pollings and surveys, but that they do represent a group encompassing all working shifts, a great variety of types of jobs, a great number of different departments and work locations, a range of age groups, significant differences in education and personalities, both sexes, walkers as well as riders, and individuals of a variety of physical proportions.

The defendant contends that since the employees who testified do not constitute a representative sample in any scientific sense, damages can be computed only upon their individual involuntary absences. The defendant contends that allowing for the maximum acceptance of the credibility of these witnesses with respect to the periods of their absences, the direct labor hours lost at the Pratt & Whitney plant by these employees was 2,208 hours and 216 at Hamilton Standard. (See defendants' Exhibit 40A and 40B as corrected by Appendix to defendant's brief). Even if all of their claimed adjustments to plaintiff's exhibits H-1 and K-1 are rejected, the resulting damages to the plaintiff would be $17,641.91 for Pratt & Whitney, and $405.92 for Hamilton Standard.

The computations made by Dr. Northrop with respect to the total involuntary absences caused by tortious acts at the premises of the Pratt & Whitney plant are set forth in Exhibits P-1 and with respect to Hamilton Standard in Exhibit P-2. P-1 computes the involuntary absences caused by tortious acts at the premises as 33.8% of the total absences, and with respect to P-2 as 29.7%. The testimony of Mr. Mooney with respect to the same subject computes

the proportion of involuntary absences to total absences with respect to the Pratt & Whitney plant during the strike period to be 34.8%, (See plaintiff Exhibit Z-1); and with respect to the Hamilton Standard plant to be 29.2%, (See plaintiff Exhibit Z-2).

Acceptance of these computations would result in damages resulting from involuntary absences due to fear, to coercion arising from tortious conduct of the defendants at the Pratt & Whitney plant to $1,402,413 based on Dr. Northrop's testimony, and to $1,443,905 based on Mr. Mooney's testimony.

In the case of Hamilton Standard applying it to the total damage as set forth in Exhibit K-1, Dr. Northrop's testimony of damages was $684,501 and Mr. Mooney's $672,978. There is thus a tremendous discrepancy between the estimate of damages of the plaintiff in both cases and those of the defendant.

The trier is concerned with reasonable probabilities. *Sheiman* v. *Sheiman,* 143 Conn. 222, 225, 121 A.2d 285; *Boland* v. *Vanderbilt,* 140 Conn. 520, 525, 102 A.2d 362. And the basic aim is to compensate the plaintiff for the loss caused by the tortious conduct so far as money can do so. *Youngset, Inc.* v. *Five City Plaza, Inc.,* 156 Conn. 22, 27, 237 A.2d 366. " 'Where a defendant has by his wrongful conduct made the calculation of damages difficult he will not be heard to urge such difficulty as a reason for not assessing by approximation.' " *Crowell* v. *Palmer,* 134 Conn. 502, 510, 58 A.2d 729. " 'From the very nature of the situation, the amount of loss cannot be proved with exactitude and all than can be required is that the evidence, with such certainty as the nature of the particular case may permit, lay a foundation which will enable the trier to make a fair and reasonable estimate.' "

Ibid. 103, 104.

It is plaintiff's claim that the opinions of Dr. Northrop and Mr. Mooney are based on inferences reasonably drawn from facts which are either assumed to be true or can be found by the trier to be proven; that based on their long experience and knowledge in this field, taking into consideration the total number of persons in the bargaining unit, the total number of members of the locals, the strike benefits paid, the issues involved in the strike, the extent of the violence and other factors set forth in their testimony that conclusions which can be drawn which are not speculative but are more probably true than not. It is further the contention of the plaintiff that the trier in reaching his conclusion is called upon to perform the same function and that the results are not speculative but are reasonable approximations.

While the findings of Judge Gaffney indicate that the tortious conduct of the defendants at the premises continued down to the end of the strike, (see paragraphs 310-317 inclusive of the finding, Record pp. 230-232) the violence prevalent up to and including June 13 was considerably abated by the injunctions issued by this court on June 13, 1960 requiring the defendants to refrain from the illegal picketing and violence which had been engaged in from the time the strike began.

The plaintiff's films taken during this period show extreme acts of violence on the part of the defendants union members at various gates of the plaintiff's plants, both at Pratt & Whitney and Hamilton Standard, making ingress and egress at the breaking hours of the shifts extremely hazardous and dangerous, either walking or in cars, to employees. There can be no doubt that this violence was intended to engender fear and that the effects of this fear continued for a lengthy period after actual violence had ceased at the gates.

The defendants' experts recognized that the effects of fear and intimidation could continue for extended periods

and that repetitive exposure to fear could reenforce and extend such intimidation.

Both Dr. Northrop and Mr. Mooney testified that the effects of such fear engendered by the tortious acts of the defendants at the gates of the Pratt & Whitney and Hamilton Standard plants were a proximate cause of involuntary absences of a portion of the plaintiff direct labor employees down to the end of the strike. Mr. Mooney was of the opinion that after July 1, the daily involuntary absences were limited to those who were afraid to return to work until the strike was over.

In estimating the number of involuntary absences, the daily total in the early period was greater in Dr. Northrop's opinion than the number indicated by Mr. Mooney, while in the latter period of the strike, it was the reverse.

Taking into consideration the injunction of June 13, 1960, a similar injunction issued by the U. S. District Court of this State, the cessation of film taking by the plaintiff of picket activity; the withdrawal of the state police; the widespread publicity both on T.V., Radio and the newspapers of the issuance of the injunctions, I am not persuaded that the after effects of the fear induced by the tortious acts of the defendants caused involuntary absences, after the week ending July 1, 1960. Nor can I find that after that date the tortious acts hitherto referred to which continued down to the end of the strike were a proximate cause of the involuntary absences.

I accept as reasonably probable the testimony of Mr. Mooney who in addition to his qualifications as an expert was an eye witness and participant to events during this period in the labor relations prior to the strike, that from June 9 up to and including July 1, the number of involuntary absences proximately caused by the tortious acts at or on the premises of the Pratt & Whitney plant were approximately 62,900 out of a total absences of the bargaining unit for the full period of the strike of approximately 266,000 or approximately 23.6% (See plaintiff Exhibit Z-1).

With respect to the involuntary absences at the Hamilton Standard plants, I believe the same situation existed from June 9 up to and including July 1, 1960. The involuntary absences numbered 17,600 out of approximately 91,000 during the strike period of 33 days or approximately 19.3%.

The bargaining unit at the Pratt & Whitney plant numbered approximately 16,000 employees which was divided into two equal parts; 50% constituted so-called "direct labor" and the other 50% being termed so-called "indirect labor." The union members of Local 1746 were divided in the same proportion. The bargaining unit at the Hamilton Standard plant constituted 4,350 employees divided similarly and the union members of Local 743 were equally divided. It is therefore reasonable to assume that the total absences in both plants were equally divided between direct and indirect labor employees and that the direct labor employees who were involuntarily absent because of fear of tortious acts of the defendants on or at the premises of the plaintiff's plants bore the same percentage relation to each other as indicated above.

Applying these percentages to the plaintiff's Exhibits H-1 and K-1, I find that the plaintiff damages in Case # 133884 (Pratt & Whitney) is 23.6% of $4,149,151 (Exhibit H-1) or $979,200.

I find that the plaintiff damages in Case #133885 (Hamilton Standard) is 19.3% of $2,304,718 (Exhibit K-1) or $444,811.

In case #133884 judgment may enter for the plaintiff to recover of the defendants the sum of $979,200 with costs, and in Case #133885, judgment may enter for the plaintiff to recover of the defendants the sum of $444,811 together with costs.

JOSEPH E. KLAU
State Referee

Filed September 4, 1973.

STATE OF CONNECTICUT
SUPERIOR COURT
HARTFORD COUNTY

SEPTEMBER 4, 1973

No. 133884

UNITED AIRCRAFT CORPORATION, organized and existing under the laws of the State of Delaware, with its principal place of business in East Hartford, Connecticut.

v.

INTERNATIONAL ASSOCIATION OF MACHINISTS, an unincorporated voluntary association with its principal office in Washington, D. C.

AERONAUTICAL INDUSTRIAL DISTRICT LODGE No. 91, INTERNATIONAL ASSOCIATION OF MACHINISTS, an unincorporated voluntary association with its office in East Hartford, Connecticut; and

INDUSTRIAL AIRCRAFT LODGE 1746 of THE INTERNATIONAL ASSOCIATION OF MACHINISTS, an unincorporated voluntary association with its principal office in East Hartford, Connecticut.

Present Hon. Joseph E. Klau, State Referee.

A judgment dated November 26, 1968, having been rendered in this action as on file, and the defendants having appealed and the plaintiff having cross appealed to the Supreme Court, and the Supreme Court on April 27, 1971, having rendered judgment as on file ordering a new trial as to the amount of compensatory damages, this action came thence to June 27, 1972, when the parties filed their stipulation that the action be referred to the Hon. Joseph E. Klau, State Referee, for hearing and judgment, and thence to September 11, 1972, when the parties appeared and were at issue to the court on the issue of compensatory damages, as on file.

The court, having heard the parties, finds that the plaintiff has sustained compensatory damages as alleged in the substituted complaint to the amount of $979,200.00.

Whereupon, it is adjudged that the plaintiff recover of the defendants $979,200.00 compensatory damages, with interest thereon from September 4, 1973, and its costs taxed at $852.35.

JOSEPH KLAU
State Referee

STATE OF CONNECTICUT
SUPERIOR COURT
HARTFORD COUNTY

SEPTEMBER 4, 1973

No. 133885

UNITED AIRCRAFT CORPORATION, organized and existing under the laws of the State of Delaware, with its principal place of business in East Hartford, Connecticut.

v.

INTERNATIONAL ASSOCIATION OF MACHINISTS, an unincorporated voluntary association with its principal office in Washington, D. C.

AERONAUTICAL INDUSTRIAL DISTRICT LODGE No. 91, INTERNATIONAL ASSOCIATION OF MACHINISTS, an unincorporated voluntary association with its office in East Hartford, Connecticut; and

INDUSTRIAL AIRCRAFT LODGE 743 of THE INTERNATIONAL ASSOCIATION OF MACHINISTS, an unincorporated voluntary association with its principal office in Windsor Locks, Connecticut.

Present Hon. Joseph E. Klau, State Referee.

A judgment dated November 26, 1968, having been rendered in this action as on file, and the defendants having

appealed and the plaintiff having cross appealed to the Supreme Court, and the Supreme Court on April 27, 1971, having rendered judgment as on file ordering a new trial as to the amount of compensatory damages, this action came thence to June 27, 1972, when the parties filed their stipulation that the action be referred to the Hon. Joseph E. Klau, State Referee, for hearing and judgment, and thence to September 11, 1972, when the parties appeared and were at issue to the court on the issue of compensatory damages, as on file.

The court, having heard the parties, finds that the plaintiff has sustained compensatory damages as alleged in the substituted complaint to the amount of $444,811.00.

Whereupon, it is adjudged that the plaintiff recover of the defendants $444,811.00 compensatory damages, with interest thereon from September 4, 1973, and its costs taxed at $420.85.

JOSEPH KLAU
State Referee

Stipulation Combining Appeals

Whereas the defendants in each of the above entitled actions intend to appeal from the judgment rendered in each action to the Supreme Court, the parties, pursuant to the provisions of the Practice Book, Section 606, hereby stipulate that both of said appeals be combined, inasmuch as said actions were tried together and they present the same or similar issues.

PLAINTIFF
By WIGGIN & DANA, *Its Attorneys*
DEFENDANTS
By NORMAN ZOLOT, *Their Attorney*

Filed September 17, 1973.

Defendants' Appeal

The appeals in the above entitled actions having been combined by order of the Court, the defendants appeal to the Supreme Court from the judgments rendered in said actions.

DEFENDANTS

By NORMAN ZOLOT, *Their Attorney*

Filed September 21, 1973.

SUPREME COURT

June Term, 1975

[Filed Sept. 2, 1975].

UNITED AIRCRAFT CORPORATION *v.* INTERNATIONAL ASSOCIATION OF MACHINISTS ET AL.

Action to determine compensatory damages, brought to the Superior Court in Hartford County and referred to *Hon. Joseph E. Klau,* state referee, who, exercising the powers of that court, rendered judgment awarding the plaintiff compensatory damages, from which the defendants appealed to this court. *No error.*

Norman Zolot and, of the District of Columbia bar, *Mozart G. Ratner,* with whom was *Burton S. Rosenburg,* for the appellants (defendants).

S. Robert Jelley, with whom was *Robert F. Cavanaugh,* for the appellee (plaintiff).

LOISELLE, J. These two appeals, which have been consolidated for presentation to this court, arise from a trial on remand in combined companion cases brought by the plaintiff, United Aircraft Corporation, against the four defendants, representatives of three different union organizational levels. The plaintiff had sought damages from the defendants, jointly and severally, in actions based on allegedly tortious acts committed in the course of illegal strikes at the plaintiff's Pratt & Whitney Division plants in East

Hartford and Manchester and at its Hamilton Standard Division plants in Windsor Locks and Broad Brook.[1]

A detailed account of the events leading up to the strike which began on June 8, 1960, and of the events during the strike which terminated on August 8 and 9, 1960, is set forth in *United Aircraft Corporation* v. *International Assn. of Machinists,* 161 Conn. 79, 285 A.2d 330, cert. denied, 404 U.S. 1016, 92 S.Ct. 675, 30 L.Ed.2d 663, the previous appeal in these cases. The previous trial court found liability against the four defendants. In assessing damages, that court first determined the monetary value of the total strike loss sustained by the plaintiff because of a deprivation of a portion of its productive labor force. The total strike loss was based primarily on two elements: (1) excessive manufacturing costs owing to the diminution of the labor force, and (2) unabsorbed fixed overhead expenses, referred to as "wasted overhead," owing to diminution of the labor force. Having arrived at a figure representing the value of the total strike damage sustained by the plaintiff owing to deprivation of a portion of its productive labor force, that court then determined the portion of that figure which represented the loss directly due to the involuntary absence of employees because of fear and coercion as a result of the illegal, tortious acts attributed to the defendants. *United Aircraft Corporation* v. *International Assn. of Machinists,* supra, 100-102.

This court upheld that trial court's decision as to the liability of the four defendants and the award of punitive or exemplary damages, but remanded the case for reassessment of compensatory damages in accordance with the opinion which pointed out that the trial court was correct in basing its computation of damages on excessive manufacturing costs and wasted overhead during the strike period and

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[1] The plaintiff's plants in North Haven and Meriden and in West Palm Beach, Florida, are not involved in the present controversy.

in relying on evidence presented, but that it was in error in including the effects of tortious acts away from the premises of the plaintiff, in computing the time period, and in excluding the item of overtime hours worked during the strike period in the computation of wasted overhead. Ibid.

The remand directed as follows: "In computing the monetary value of the plaintiff's strike losses at the Pratt & Whitney Division plants and Hamilton Standard Division plants due to the involuntary absence of employees because of fear and coercion as a result of the illegal, tortious activities which occurred at these plants, the trial court should, on remand, determine the amount of absence from the Pratt & Whitney Division plants which was involuntary as the result of the illegal, tortious activities which occurred at those plants from June 8 to August 8 and 9, 1960, and the amount of absence from the Hamilton Standard Division plants which was involuntary as a result of the illegal, tortious activities which occurred at those plants from June 8 to August 8 and 9, 1960. On the basis of the figures representing the monetary value of the total strike losses sustained by the plaintiff at each of these divisions due to the loss of productive labor and the figures representing the aforementioned amount of involuntary absence the damage to which the plaintiff is entitled may be determined." Id., 104-105.

Upon remand, the trial court found that $4,149,151 was the total strike loss incurred during the strike period at Pratt & Whitney's East Hartford and Manchester plants, that $2,304,718 was the total strike loss incurred during the strike period at Hamilton Standard's Windsor Locks and Broad Brook plants. It found that the plaintiff's strike loss at the Pratt & Whitney Division plants proximately caused by the defendants' tortious acts on the plant premises was 23.6 percent of the total strike loss of $4,149,151 or $979,200. It found that the plaintiff's strike loss at the Hamilton Standard Division plants proximately caused by the defendants' tortious acts on the plant premises was 19.3 percent of the total loss of $2,304,718 or $444.811. Judgments were rendered for the plaintiff in these sums together with interest and costs. The defendants have appealed.

The court's finding, which has 401 numbered paragraphs covering 109 printed pages of the record, is the subject of an extensive attack by the defendants. No useful purpose would be served by a detailed discussion of these assignments of error. Suffice it to say that after laborious hours and days spent in examining and comparing the draft finding and the finding of the court with the long and detailed appendices, nine paragraphs of the draft finding have been added to the finding, and one paragraph of the finding has been deleted. None of those corrections materially affects the finding of the court which was detailed and comprehensive.

In accordance with the remand, the court, after finding excessive manufacturing costs and wasted overhead, determined the monetary value of the total strike loss sustained by the plaintiff as the first step in its assessment of damages. That determination, $4,149,151 for the Pratt & Whitney Division and $2,304,718 for the Hamilton Standard Division, is attacked by the defendants.

The principal source for establishing values for manufacturing costs and wasted overhead are exhibits in which the figures used were taken from the actual ledgers and payroll records of the plaintiff. The court found that the figures and computations in these exhibits were accurate and correct.

The court accepted the plaintiff's standard accounting system as a reasonable basis for computing the plaintiff's excessive manufacturing costs and waster overhead owing to the man-hours of labor lost. It relied on the evidence of the plaintiff's manufacturing costs for the period from January to May, 1960, as a base for computing excess manu-

facturing costs during the strike period. For this computation the court took into consideration six categories of Pratt & Whitney's shop losses: labor efficiency variance, overtime premiums, corrective work, training, spoiled work, and make or buy conversions. Those same categories, with the exception of training costs, were considered in computing Hamilton Standard's excess manufacturing costs. Other categories of shop losses, such as night shift premiums, third shift premiums and waiting time, were not included in the computation. Further, additional losses caused by the strike which could not be measured objectively, such as losses in the experimental shop, losses owing to the absence of indirect labor employees, and losses from strike disruptions after the strike, were not considered. The cost of wasted overhead at both divisions as found by the court is supported by the findings. Included in the calculation of wasted overhead was the item of overtime hours worked during the strike as directed by this court in the remand. *United Aircraft Corporation* v. *International Assn. of Machinists,* 161 Conn. 79, 101, 285 A.2d 330.

The defendants claim that items in these exhibits relied upon by the court were inaccurate and that the court was in error in accepting this evidence. The defendants were permitted to advance and pursue these claims despite the plaintiff's objections that they were beyond the mandate of this court's remand. The claims raised specifically concern (1) spoiled work and waiting time, being items which relate to excess manufacturing cost, and (2) accelerated depreciation, general and administrative expenses, and work during vacation shutdown, being items which relate to wasted overhead. The court found that during the strike there was a high incidence of spoiled work; it accepted the spoiled work items in the exhibits. This is a matter of credibility. Waiting time was not considered in the computation of the plaintiff's losses. It was the opinion of the plaintiff's comptroller that he could not associate the cause of waiting time with the presence or absence of a strike and that waiting time

was not a relevant factor. Consequently, it was not included either in the base period of January to May, 1960, or in the strike period. The Court accepted this evidence. The court specifically found that accelerated depreciation as an expense was allowed by the United States government for tax purposes and contract purposes under certificates of necessity, and that the plaintiff regularly and consistently used accelerated depreciation in its regular accounting and profit and loss statements in 1960, and in the years prior thereto. The court also specifically found that general and administrative expenses included the costs of the accounting department, executive staff, and other management departments, and that these were fixed expenses and were an excessive burden on the low level of production. It concluded that these general and administrative expenses were properly calculated to determine wasted overhead. The court noted that no overhead was claimed during the vacation shutdown periods and found that it was not possible to calculate how many persons would have been expected to work had there been no strike or to calculate whether the hours actually worked were more or less than the expectation, and that under these circumstances it was fair and reasonable for the plaintiff to exclude both the overhead and the direct labor hours during the vacation shutdown periods from its calculations of strike losses. The claims relative to these items all involve questions of fact; they were all resolved against the defendants. The findings on these matters are supported by the appendices and must stand. As to the accuracy of the items considered by the court in computing the plaintiff's excess manufacturing costs and wasted overhead, "[i]t was enough that the court relied on evidence which showed 'the extent of . . . [these items] as a matter of just and reasonable inference, although the result be only approximate.' *Story Parchment Co.* v. *Paterson Parchment Paper Co.,* 282 U.S. 555, 563, 51 S.Ct. 248, 75 L.Ed. 544; *Ball* v. *T. J. Pardy Construction Co.,* 108 Conn. 549, 551, 143 A. 855." *United Aircraft Cor-*

poration v. *International Assn. of Machinists*, supra, 101. See also *Dunn Bros., Inc.* v. *Retail Clerks, Local 1529* (Tenn Ct. App.) 69 Labor Cases ¶ 52,956. The court properly computed excessive manufacturing costs and wasted overhead.

The defendants extensively and vigorously attack the court's findings and conclusions that 23.6 percent of the bargaining unit and direct labor absences during the strike period at the Pratt & Whitney Division and 19.3 percent of the bargaining unit and direct labor absences at the Hamilton Standard Division were owing to the tortious acts of the defendants. The principal, and pivotal question raised by the defendants' attack is whether the court's determination of involuntary absences owing to tortious and coercive acts of the defendants was based on competent evidence, and specifically, whether the court could legally rely on the opinion of Morgan R. Mooney, the plaintiff's former vice president for industrial relations, as to the amount of involuntary absence during the strike period up to and including July 1, 1965. It is the defendants' contention that, on the factual evidence presented, the amount of involuntary absence attributable to strike violence cannot be estimated with "reasonable probability" or with any degree of assurance necessary to support the judgment of a court of law.

At the trial on remand, the plaintiff offered the testimony of a number of employee witnesses who testified that their absence during the strike was caused by the defendants' tortious acts at the plaintiff's plant premises. One hundred and thirty-five employees testified as oral witnesses, and the transcripts of the testimony of 73 other employees who had testified at the previous trial were introduced into evidence. Mooney and Herbert R. Northrup, professor of industry at the Wharton School of Finance and Commerce, testified at great length as to their opinions of the amount of involuntary absenteeism during the strike period. Each

produced tabulations of such opinions. Northrup's opinion based on his tabulations was that 33.8 percent of the absences at the Pratt & Whitney Division and 29.7 percent of the absences at the Hamilton Standard Division were caused by tortious acts at the plant premises. Mooney's opinion, based on his tabulations, was that 34.8 percent of the absences at the Pratt & Whitney Division and 29.2 percent of the absences at the Hamilton Standard Division were caused by the tortious acts at the plant premises. The total number of workers absent each day was not in dispute, having been derived by deducting the number of workers present each day at the plants, less newly hired employees, from the number in the bargaining unit. The court found that the effects of the violence and mass picketing at the plaintiff's plant premises continued up to and including July 1, 1960. It also found that 23.6 percent of the bargaining unit absences at the Pratt & Whitney Division and 19.3 percent of the bargaining unit absences at Hamilton Standard Division were caused by the defendants' tortious acts at the plant premises. The court's findings with regard to the percentages of involuntary findings with regard to the percentages of involuntary absences found coincide with Mooney's opinions for the period from the start of the strike, June 8, 1960, up to and including July 1, but do not include Mooney's opinion of involuntary absences from July 2 to the end of the strike period.

The defendants assert that the plaintiff's experts, Mooney and Northrup, were not qualified to state an opinion as to the number of absences at the plaintiff's plants caused by tortious acts on the plant premises during the strike. The court however, found that both witnesses qualified as experts to render opinions regarding involuntary absenteeism during the strike.[2] "The determination of the qualification

[2] The court found the following: Herbert R. Northrup is professor of industry at the Wharton School of Finance and Commerce of the University of Pennsylvania. From 1964 to 1969, he was chairman of the department of industry of the Wharton

of an expert is largerly a matter for the discretion of the trial court." *Coffin* v. *Laskau*, 89 Conn. 325, 329 94 A. 370; *Oborski* v. *New Haven Gas Co.*, 151 Conn. 274, 280, 197 A.2d 73. The trial court's decision is not to be disturbed on appeal "unless that discretion has been abused, or the error is

School. He has a bachelor of arts degree in economics from Duke University, and master of arts and doctor of philosophy degrees in industrial relations and labor economics from Harvard University. His particular areas of specialization have been (1) race relations and civil rights in industry and (2) collective bargaining. He was a senior hearing officer with the war labor board during World War II. During the period from 1949 to 1961, he was employed in private industry, first as industrial relations consultant with Ebasco Services, a consulting firm, then as vice president for industrial relations for Penn-Texas Corporation, and finally as employer relations consultant with General Electric Company, where he was a member of the top industrial relations staff and was responsible for all employee relations in 70 plants employing 100,000 employees. He has published about 150 to 200 articles in various professional journals, and has written about 15 books. One of the books is a textbook entitled "Economics of Labor Relations," now in its seventh edition, which is the most widely used textbook in its field and is used at about 275 colleges and universities. He has written an article and a book dealing with the labor relations policies of General Electric Company, including General Electric's strike in October, 1960.

Morgan R. Mooney was vice president for industrial relations of United Aircraft Corporation at the time of the first trial in 1968, and retired from that position on July 31, 1972. At the time of the strike in 1960, he was personnel director of United Aircraft Corporation. He graduated from Yale University in 1929 with a bachelor of arts degree. Thereafter he was a graduate student at Yale studying labor economics and political science. From 1933 until 1935 he worked for the federal government as a labor compliance officer in the national industrial recovery administration. He then became deputy commissioner of labor in the Connecticut department of labor and factory inspection from 1935 to 1942. In that position he acted as secretary of the Connecticut state board of mediation and arbitration, and he had the responsibility of investigating and attempting to mediate and settle strikes and other labor disputes throughout the state of Connecticut. He acted as investigator or mediator or both in about 75 to 100 strikes, and in

clear and involves a misconception of the law." 31 Am. Jur. 2d 531, Expert and Opinion Evidence, § 31; *State* v. *Lally*, Conn. (36 Conn. L.J. No. 33, pp. 1, 4); *Nash* v. *Hunt*, Conn. (35 Conn. L.J., No. 49, pp. 7, 9); *Siladi* v. *McNamara*, 164 Conn. 510, 513, 325 A.2d 277. From the footnoted findings which recite the witnesses' qualifications and experience in the field of industrial relations, it is clear that they were reasonably qualified as experts to form and render opinions as to the effects of violence during a strike. The court did not abuse its discretion in ruling them to be experts, qualified to render opinions on the issues in this case.

The defendants claim that even though Northrup and Mooney may be found to be experts in their field, their testimony should not have been admitted as there was no factual basis for their opinions. It is the defendant's position that the only competent evidence of involuntary absences owing to strike violence was the testimony either of the absentees themselves or of a representative sample of all the employees. The court found that the group of employee witnesses who testified or whose testimony was received into evidence by transcripts was not a representative sample of all the employees employed in 1960, in a statistical or scientific sense. The court further found that "[i]n view of the pretrial and legal problems of obtaining reliable data from a statistically representative sample of absentees either during or immediately after the strike was plaintiff able to obtain reliable data from a

so doing discussed strikes, strike methods, and strike measures with union leaders, members and negotiators. In 1942 he was employed by United Aircraft Corporation, first as assistant to the personnel director and then as assistant personnel director, before becoming personnel director in 1957. In his position as personnel director, Mooney was thoroughly familiar with all aspects of the 1960 strikes at Pratt & Whitney and Hamilton Standard, having been an eye witness to picket line activities at all plants during the strike and a participant in all negotiations with the unions prior to and during the strike.

statistically representative sample of absentees for introduction into evidence." The defendants argue that, in light of those findings, the only basis for a judgment of damages was that group of absentee witnesses whose testimony as to the amount of time they lost from work owing to the tortious acts of the defendants was heard by the court. The court, however, also considered the testimony of the two experts, and it is that consideration which is under attack.

In the previous opinion, this court observed that the trial court determined the percentage of employees who stayed away involuntary from their employment primarily on the basis of Northrup's testimony. The court also commented that "[W]hile expert opinion would be relevant provided the court accorded it persuasive weight as was done in these cases, other methods of determining the elements of involuntary absence of equal or greater weight might be resorted to such as a representative sampling of employees who refrained from work. The evidence to be relied on for arriving at a reasonable approximation is for the court to decide." *United Aircraft Corporation* v. *International Assn. of Machinists,* 161 Conn. 79, 105-106, 285 A.2d 330. In view of the trial court's finding that a statistically representative sample of absentees was not obtainable, the court did not, as claimed by defendants, err in considering the opinions of the two experts who testified for the plaintiff.

This state has long had a simple and workable standard for the admissibility of expert opinion "The true test of the admissibility of such testimony is not whether the subject matter is common or uncommon, or whether many persons or few have some knowledge of the matter; but it is whether the witnesses offered as experts have any peculiar knowledge or experience, not common to the world, which renders their opinions founded on such knowledge or experience any aid to the court or the jury in determining the questions at issue." *Taylor* v. *Monroe,* 43 Conn. 36, 44, cited with approval in *Schomer* v. *Shilepsky,* — Conn. (37 Conn. L.J., No. 4, pp. 10, 12). Implicit in this standard is the requirement, later articulated, that the expert's knowledge or experience must be directly applicable to the matter in issue. *Siladi* v. *McNamara,* 164 Conn. 510, 513-14, 325 A.2d 277.

Mooney based his opinions upon his entire personal experience and his personal knowledge, particularly that of the strike violence. He had viewed movies at the plaintiff's plant premises of the violence and had personally observed the violence and its *impact* upon the employees arriving at the premises to work. *He also observed those employees who turned around at the gate and left.* In ariving at an opinion as to the number of involuntary absences during the strike, he took into account his estimate of "committed strikers," those strikers who were committed to staying out for the duration of the strike. He conservatively estimated the committed strikers by relating his estimate to the number of union members who voted to strike, the average number of union members paid strike benefits, and the number of strikers who registered to return to work at the end of the strike. He also took into consideration, but did not quantify, employees who wanted to wait and see the outcome of the strike, employees who did not want to alienate fellow employees, employees who went out on strike but returned for economic reasons, and employees who were absent because of fear created by tortious acts committed off the premises.

Northrup based his opinion on his own experience and research over the years and on assumptions in a hypothetical question put to him, which included substantially the same factors as those relied upon by Mooney, including a review of the filmed strike violence.

The defendants' experts, authorities in labor, economics, social sciences, political sociology, and psychology each

testified that the plaintiff's expert witnesses' opinions were speculative and mere guesses. It was their opinion that the only source of reasonable approximation was data based upon accurately ascertained subjective motivation of each absent employee which could be obtained only through interview or testimony, with results of varying degrees of accuracy. All testified that, except by examining the employees' actual reasons, there is no probative source of evidence to support any reference (sic) as to the reasonably approximate quantum of involuntary absences on any day or on all days of the strike. The court did not accept the testimony of the defendants' experts as to the opinions of Mooney and Northrup. The fact that the subjective motivation or state of mind, in this case the absentees' fear, could be infered by the trier from other facts is a well settled rule of evidence. Frequently the only method of establishing what lay in the mind of a person when he acted is through such an inference. *State* v. *Moynahan*, 164 Conn. 560, 579, 325 A.2d 199, cert. denied, 414 U.S. 976, 94 S.Ct. 291, 38 L. Ed. 2d 219; *Hennessey* v. *Hennessey,* 145 Conn. 211, 214-215, 140 A.2d 473.

The defendants argue that it is apparent that the court rejected Northrup's opinion and adopted a portion of Mooney's opinion. Neither the finding nor the memorandum of decision indicates that the court rejected the evidence of the employee witnesses, the opinion of Northrup or a portion of Mooney's opinion. It is evident that the court placed more reliance on a portion of Mooney's opinion, that is, his opinion of absences attributable to the tortious acts of the defendant from the beginning of the strike to and including July 1, 1960. The court was concerned with reasonable probabilities. *United Aircraft Corporation* v. *International Assn. of Machinists,* 161 Conn. 79, 103, 285 A.2d 330; *Sheiman* v. *Sheiman,* 143 Conn. 222, 225, 121 A.2d 285. The circumstance was not one in which all factors could be proved with mathmatical precision.

What was cited in the previous appeal (p. 104) is worth reiterating here: "Where a defendant has by his wrongful conduct made the calculation of damages difficult, he will not be heard to urge such difficulty as a reason for not assessing by approximation." *Crowell* v. *Palmer,* 134 Conn. 502, 510, 58 A.2d 729. See also *Valitsky* v. *Valitsky,* — Conn. (36 Conn. L.J., No. 39, pp. 25, 26); *Baker* v. *Baker,* — Conn. (35 Conn. L.J., No. 52, pp. 1, 5). "From the very nature of the situation, the amount of loss cannot be proved with exactitude and all that can be required is that the evidence, with such certainty as the nature of the particular case may permit, lay a foundation which will enable the trier to make a fair and reasonable estimate." *Ball* v. *T. J. Pardy Construction Co.,* 108 Conn. 549, 551, 143 A.2d 855; see also *Collens* v. *New Canaan Water Co.,* 155 Conn. 477, 490, 234 A.2d 825. Considering the experience and knowledge of Northrup and Mooney and the facts upon which their opinions were based, the court did not rely unreasonably upon their opinions, particularly those of Mooney, so as to make its decision an error of law.

The defendants further argue that as the court adopted Mooney's estimate of absences from tortious conduct of the defendants for the period prior to and including July 1, 1960, but rejected his estimate of absences during the subsequent period of the strike, this rejection fatally undercut his pre-July 1 opinion and makes the court's reliance upon that opinion worthless. The finding of the court that the effects of the violence and mass picketing at the plaintiff's plants continued up to and including July 1, 1960, is attacked by the defendants as unsupported by the evidence. The tabulations of daily absences from both divisions of the plaintiff during the strike period clearly show a definite leveling off of absences from July 1 to the termination of the strike. In examining the appendices in support of this finding, the testimony of Mooney

is significant in his explanation of the leveling off of absences after July 1. It was his opinion that, in the period after July 1, employees who were kept out of work because of the tortious acts of the defendants simply were not going to come back until the strike was over. It is apparent that the court did not reject Mooney's opinion as to the number of persons who were still affected by fear after July 1, but the court's reasoning is clearly enunciated in its memorandum of decision wherein it is stated: "Taking into consideration the injunction of June 13, 1960, a similar injunction issued by the U.S. District Court of this State, the cessation of film taking by the plaintiff of picket activity; the withdrawal of the state police; the widespread publicity both on T.V., radio and the newspapers of the issuance of the injunctions, I am not persuaded that the after effects of the fear induced by the tortious acts of the defendants caused involuntary absences after the week ending July 1, 1960. Nor can I find that after that date the tortious acts hitherto referred to which continued down to the end of the strike were a proximate cause of the involuntary absences." In weighing the testimony of an expert, the trier of fact may accept part of the testimony of an expert without being bound by all of the opinion of an expert. *Northeastern Gas Transmission Co.* v. *Tersana Acres, Inc.,* 114 Conn. 509, 512, 134 A.2d 253; *Clark* v. *Haggard,* 141 Conn. 668, 674, 109 A.2d 358. The court was not in error in finding that after July 1, the plaintiff did not prove the proximate causation of the tortious acts to the involuntary absences. *Robinson* v. *Southern New England Telephone Co.,* 140 Conn. 414, 418-19, 426, 101 A.2d 491; *Kilduff* v. *Kalinowski,* 136 Conn. 405, 407-408, 71 A.2d 593. This determination did not affect or destroy the weight which the court gave to Mooney's testimony and opinion concerning that period between the commencement of this strike and July 1, 1960.

The calculations of the percentages of absences due to the tortious acts of the defendants as determined by the

court as related to the monetary value of the total strike losses sustained by the plaintiff at each of its divisions were supported by the evidence and in accordance with law and were determined in conformity with the remand of this court.

There is no error.

In this opinion the other judges concurred.

Nos. 133884 and 133885

UNITED AIRCRAFT CORPORATION

v.

INTERNATIONAL ASSOCIATION OF MACHINISTS, ET AL.

October 7, 1975.

The defendants' preliminary motion to reargue filed September 12, 1975, and their supplemental motion to reargue filed September 22, 1975, are denied.

By the Court,

/s/ HOUSE
Chief Justice

SUPREME COURT OF THE UNITED STATES

No. A-582

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, ET AL., *Petitioners,*

v.

UNITED AIRCRAFT CORPORATION

Order Extending Time To File Petition for Writ of Certiorari

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including February 15, 1976.

/s/ THURGOOD MARSHALL
Associate Justice of the Supreme Court of the United States

Dated this 30th day of December, 1975.

Order Further Extending Time To File Petition for Writ of Certiorari

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, further extended to and including March 5, 1976.

/s/ THURGOOD MARSHALL
Associate Justice of the Supreme Court of the United States

Dated this 29th day of January, 1976.

Supreme Court, U. S.
FILED
APR 22 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1263

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS (AFL-CIO), *et al.*,
Petitioners,

v.

UNITED AIRCRAFT CORPORATION,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CONNECTICUT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1263

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS (AFL-CIO), *et al.*,
Petitioners,

v.

UNITED AIRCRAFT CORPORATION,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CONNECTICUT

Opinions Below

The memorandum of decision of the Superior Court on liability is reported unofficially at 68 L.R.R.M. 2488, 58 CCH Lab. Cas. ¶51,930, and its memorandum of decision following the first damages trial is reported unofficially at 70 L.R.R.M. 2577, 59 CCH Lab. Cas. ¶52,043. The first opinion of the Supreme Court of Connecticut is reported officially at 161 Conn. 79, 285 A.2d 330, *cert. denied* 404 U.S. 1016.

The memorandum of decision of the Superior Court following the second damages trial is not reported. The second opinion of the Connecticut Supreme Court, on the amount of compensatory damages, is not yet officially reported, but is reported unofficially in 37 Conn. Law Jour-

nal for September 2, 1975, at 7-13, and at 90 L.R.R.M. 2249.[1] It is the second opinion that is the subject of the Petition for Certiorari.

Jurisdiction

Petitioners invoke the jurisdiction of this Court under 28 U.S.C. §1257(3). The second of the claimed "Questions Presented" (the "due process" question) was not "specially set up or claimed under the Constitution" in a proper manner below, as discussed at pages 19-20 herein.

Questions Presented

The first of the claimed "Questions Presented" is not presented by the facts of the case, as discussed at pages 18-19 herein.

Counter Statement of the Case

Respondent disagrees with petitioners' Statement of the Case (Petition 4-25), which bears little resemblance to the facts found by the trial court and approved by the Connecticut Supreme Court. Respondent also disagrees with petitioners' History of this Litigation (Petition 25-32), which distorts the evidence at the trials, the findings and decisions of the trial court, and the Connecticut Supreme Court's decisions.

The parties having stipulated for a separation of the issues of liability and damages, the liability trial, requiring

1. Petitioners' printing of the Connecticut Supreme Court's second opinion in their Appendix (110a-125a) contains a number of typographical errors, particularly on pages 117a (where words are added) and 119a (where a number of words are omitted). By letter dated March 24, 1976, petitioners agreed to correct the errors, as requested by respondent, but the corrections had not been made when this brief went to the printer on April 15, 1976. On the latter date, petitioners stated that the corrections would be made shortly.

18 trial days, took place in early 1968, and resulted in a determination of liability (A.29a-55a). The first damages trial, requiring 12 trial days, took place in July, 1968, and resulted in judgments for compensatory and exemplary damages (A.56a-64a). The Connecticut Supreme Court affirmed as to liability for events occurring at plaintiff's plant premises but not as to events away from the premises, affirmed as to exemplary damages, and remanded for a new trial on compensatory damages (A.65a-91a). After the denial of the unions' petition for certiorari, 404 U.S. 1016 (1972), the second damages trial, requiring 24 trial days, took place in late 1972 and early 1973, and resulted in the judgments for compensatory damages now sought to be reviewed by petitioners (A.94a-109a). The Connecticut Supreme Court affirmed (A.110a-125a).

Under Connecticut law the trial court's findings, not its memorandum of decision, are the basis of appellate review.[2] Respondent has filed herein certified copies of the printed records before the Connecticut Supreme Court in the two appeals. The first (bearing docket number 6646) is the record from the liability and first damages trial ("First Trial R."); the trial court's Finding (First Trial R.183-431) includes 760 findings of fact (First Trial R.183-310). The second printed record (bearing docket number 7576) is the record from the second damages trial ("Second Trial R."); the trial court's Finding (Second Trial R.137-246) includes 357 findings of fact (Second Trial R.137-212).

Petitioners' Statement of the Case relies largely on proposed or draft findings (abbreviated "D.F." in their peti-

2. "The only available source of facts on any appeal is the finding as provided for by statute." *Munson* v. *Atwood*, 108 Conn. 285, 290 (1928); "The memorandum of decision establishes no facts and cannot take the place of the finding, which is essential to test rulings on evidence and conclusions of law or fact drawn by the trier. . . ." *Saraceno* v. *Capitol Theatre Realty Corp.*, 154 Conn. 669, 672 (1967).

tion) not adopted by the trial court; the following Counter Statement of the Case relies exclusively on the findings of fact ("F." herein) made by the trial court and contained in the printed records.[3]

1. *The Parties.* Plaintiff United Aircraft Corporation is a Delaware corporation with its offices in East Hartford, Connecticut (F.3, First Trial R.183). In 1960, its Pratt & Whitney Aircraft Division, which manufactured aircraft engines, had plants at East Hartford, Connecticut, with 22,000 employees, Manchester, Connecticut, with 175 to 200 employees, Southington, North Haven, and Meriden, Connecticut, and West Palm Beach, Florida (F.3-5, 7, 12, First Trial R.183-185). Its Hamilton Standard Division, which manufactured propellers, jet engine accessories, and electronic devices, had plants at Windsor Locks, Connecticut, with 6500 employees, and Broad Brook, Connecticut, with 700 employees (F.3, 5, 22, First Trial R.183-185).

Defendant International Association of Machinists ("International"), frequently known as the "Grand Lodge", is an unincorporated voluntary association with its headquarters in Washington, D. C. (F.33, 34, First Trial R.187). In 1959 and 1960, Albert J. Hayes was President of the International, and Fred Coonley was one of its General Vice Presidents (F.33, 37, 40, First Trial R.187-188). Vice President Coonley was based in New York City, and plaintiff's East Hartford, Manchester, Windsor Locks and Broad Brook plants were in the geographical area for which he was responsible (F.40, First Trial R.188). Under his supervision were Grand Lodge Representatives appointed by the International President whose general duties included organizing, negotiating contracts, settling grievances, settling disputes within local lodges and district

3. The Connecticut Supreme Court's summary of the liability facts appears at pages 73a-78a of the Appendix.

lodges, handling legislative matters, assisting district and local lodges, and in strike situations assisting local lodges to make arrangements for the conduct of the strike, setting up picket lines, supervising picket lines, and assisting local lodges in obtaining support (F.39, 41, 43, First Trial R.188). During 1959 and 1960 Richard L. Thurer was the senior Grand Lodge Representative assigned to supervise District 91 and Lodges 1746 and 743, and had general supervision over the International's affairs in such area (F.45, First Trial R.189).

Defendant Aeronautical Industrial District Lodge No. 91, International Association of Machinists ("District 91") is an unincorporated voluntary association with its office and place of business in East Hartford, Connecticut. It is an administrative arm of the International, and has administrative control over Lodges 1746 and 743 (F.53, 56, 57, First Trial R.190). Its business affairs were administered by its Senior Business Representative John K. Main, its Business Representatives George Cope, John R. Sullivan and Robert Nelson, and its District Organizers Raymond Jutras and Robert Davis (F.60, 65, 67, 69, 71, 73, 74, First Trial R.190-191).

Defendant Industrial Aircraft Lodge No. 1746, International Association of Machinists ("Lodge 1746") is an unincorporated voluntary association with its office and place of business in East Hartford, Connecticut. In 1959 and 1960 it was the bargaining agent for the 16,000 bargaining unit employees at Pratt & Whitney's East Hartford plant and the 150 bargaining unit employees at its Manchester plant (F.7, 12, 78, First Trial R.184, 192). There was no union shop at the plants, and in December, 1959, Lodge 1746 had only 6178 members; by June, 1960, the membership had dropped to 5858 (F.16, 78, 101, First Trial R.185, 192, 196). In 1959 and 1960 its President was David Fraser and its Vice President was William Stewart; it also

had eight other officers, nine committeemen, and 50 to 70 stewards at the East Hartford plant (F.80, 81, 88, First Trial R.192-193). Committeemen were members of the Executive Board, and stewards, because of their duties, were considered union leaders by the membership of Lodge 1746 and were accorded that status by the union (F.89, 90, First Trial R.193-194).

Defendant Hartford Aircraft Lodge No. 743 ("Lodge 743") is an unincorporated voluntary association with its office and place of business in East Hartford, Connecticut. In 1959 and 1960 it was the bargaining agent for the 4,000 bargaining unit employees at Hamilton Standard's Windsor Locks plant and the 350 bargaining unit employees at its Broad Brook plant (F.22, 91, First Trial R.185, 194). In 1959 and 1960 its President was Butler J. Seedman (F.93, First Trial R.194). Its Vice President for Windsor Locks was Edward Batchelder and its Vice President for Broad Brook was William Merrigan, although Committeewoman Ann DeFilipo was considered the top officer of the union at Broad Brook (F.93, 97, First Trial R.194-195). Lodge 743 also had a Shop Committee, who were members of its Executive Board, and stewards, who were considered union leaders by the members and were accorded that status by the union (F.89, 90, 93, First Trial R.193-195).

2. *Events Leading Up To The Strike.* Plaintiff and Lodge 1746 were parties to collective bargaining agreements dated December 5, 1957 covering bargaining unit employees at Pratt & Whitney's East Hartford and Manchester plants. During the fall of 1959, prior to the expiration of the agreements on December 4, 1959, plaintiff bargained with Lodge 1746 on the terms of new agreements. A contract offer was made by the plaintiff, but was rejected on December 3, 1959 by the 1250 members of Lodge 1746 who voted on it, 673 to 577. Thereafter employees at the East Hartford and Manchester plants worked without contracts until the strike began on June 8, 1960 (F.99-102, First Trial R.195-196).

Plaintiff and Lodge 743 were parties to collective bargaining agreements signed April 28, 1958 covering bargaining unit employees at Hamilton Standard's Windsor Locks and Broad Brook plants. During March and April, 1960, prior to the expiration of the agreements on April 21, 1960, plaintiff bargained with Lodge 743 on the terms of new agreements. A contract offer was made by the plaintiff, but was rejected by members of Lodge 743 on April 21, 1960. Thereafter employees at the Windsor Locks and Broad Brook plants worked without contracts until the strike began on June 8, 1960 (F.111-114, First Trial R.197-198).

The primary issues at both divisions were non-economic: union shop, automatic wage progression in place of the merit rating system, plant-wide seniority, full arbitration and hearing of grievances, and control by the union over subcontracting (F.383, First Trial R.242).

Even before the expiration of the collective bargaining agreements, plans were underway at the International, District and local levels for the strike; such plans were largely dominated by the International. On November 30, 1959, there was a meeting in Hartford attended by the International's General Vice Presidents Coonley and Seimiller, whose office was in Chicago, Grand Lodge Representative Thurer, and Lodges 1746 and 743 Presidents Fraser and Seedman. They discussed the contract negotiations with United Aircraft Corporation and plans for the strike (F.104, First Trial R.196). Although not in accordance with the International's usual policy, direct responsibility for conducting the strike was delegated by the International to General Vice President Coonley and Grand Lodge Representative Thurer (F.144, First Trial R.203). Vice President Coonley had had jurisdiction over

the International's strike against Republic Aviation in Farmingdale, Long Island in 1956. That strike, which had involved much violence, had been a precedent-setting victory for the union and had produced a very good settlement including a union shop (F.123-126, First Trial R.200).

On December 15, 1959, Grand Lodge Representative Thurer, Senior Business Representative Main, Business Representatives Cope and Sullivan, and Presidents Fraser and Seedman had a meeting to discuss matters relating to United Aircraft Corporation (F.105, First Trial R.197). In January, 1960, Dean Ruth, a publicity man at the International's Washington, D. C. headquarters, was assigned by Vice President Coonley to work for Grand Lodge Representative Thurer and to assist Lodge 1746 with publicity during the early months of 1960. Mr. Ruth had handled publicity during the Republic Aviation strike in 1956 (F.129, 145, First Trial R.201, 203).

In late December, 1959, the International's General Counsel Papps discussed with either President Hayes or his assistant, General Vice President Walker, figures regarding the size of the bargaining units represented by Lodges 1746 and 743, the size of their memberships, and other vital statistics and his view that the locals would "be nuts to strike" but he was told to stay out of the matter and let things take their own course (F.106, First Trial R.197).

During the week of April 3, 1960, Business Representative Cope, District Organizer Jutras, and President Fraser met with Vice President Coonley to discuss the International's policy governing local and district lodges involved in multiple agreements, a policy which had application to the situation at United Aircraft Corporation (F.108-110, First Trial R.197). The negotiations both at Pratt & Whitney and at Hamilton Standard had been conducted not only by representatives of the local lodges

concerned but also by representatives of District 91 and the International (F.100, 112, First Trial R.196, 198).

In February, 1960, Lodge 1746 had appointed the members of its Strike Policy Committee, and Lodge 743 did likewise prior to May 15, 1960. In May both lodges prepared strike rosters listing the members of the Strike Policy Committees and their assignments, and also showing the designation of legal counsel, bondsmen, and hospitals (F.146, First Trial R.203).

On April 10, 1960, at a meeting of the members of Lodge 1746, District Organizer Jutras had reported that he had been assigned "to start a future program against" United Aircraft Corporation, that he had visited the International's local lodge at the Republic Aviation Corporation "for suggestions as to how to stage a successful strike," that if they struck they must fight and fight hard and they would need hundreds of pickets, and also attorneys to fight injunctions (F.115, First Trial R.198).

At the District 91 meeting on April 11, 1960, a week before consideration by Lodge 743 of plaintiff's final offer, District Organizer Jutras reported that he had been assigned to lay out machinery for strike action in Lodges 1746 and 743, that he had been to Farmingdale, Long Island (Republic Aviation Lodge) and "learned much", and that "experienced help" was available from Grand Lodge "to train and help our membership" (F.116, First Trial R.199). At the same meeting, Business Representative Sullivan reported that Lodge 743 was weak (F.117, First Trial R.199), and Senior Business Representative Main was authorized to hire Bushnell Hall for the planned mass meeting, of which Vice President Coonley was coordinator, to be addressed by President Hayes on May 22, 1960 (F.118, First Trial R.199).

On May 15, 1960, Grand Lodge Representative Joseph Curran, who was billed as an expert, addressed a meeting

of 409 picket captains from Lodges 1746 and 743 and instructed them about their strike duties. He had been assigned by Vice President Coonley at District 91's request, and after the meeting District Organizer Jutras reported to Mr. Coonley that the meeting was very successful and that "these captains fully realize the seriousness of the impending situation and are better prepared to fulfill their obligation." Mr. Curran had been the Grand Lodge Representative assigned to the Republic Aviation Lodge at the time of its violent and successful strike in 1956 (F.119-126, First Trial R.199-200).

A scheduled mass meeting of Lodges 1746 and 743 at Bushnell Hall was held on Sunday, May 22, 1960. The unions had made a big effort to produce a large attendance at the meeting but there was not a large audience, and President Hayes, who addressed the meeting, was disappointed at the turnout (F.141, First Trial R.202).

The next day, May 23, 1960, strike votes were taken. At Lodge 1746, 3488 voted in favor of a strike and 788 voted against it. At Lodge 743, 1493 voted in favor of the strike, and 289 voted against it (F.142, First Trial R.202).

Prior to the strike Grand Lodge Representative Thurer had discussed with Senior Business Representative Main the assignment of District 91 personnel during the strike. Mr. Main was directly in charge of the strike, and also had the function of going to the police station and bailing out those who were arrested on the picket line. District Organizer Jutras was Mr. Main's assistant in charge of the strike and coordinated the activities of the other Business Representatives and District Organizers. Business Representatives Cope and Nelson were to supervise activities at the gates of the East Hartford plant. and it was Mr. Cope's intention in that assignment that the strikers block the gates at the East Hartford plant so that the employees would not be able to get into work. District

Organizer Davis's assignment was to keep the gates manned by pickets. Business Representative Sullivan was to supervise activities at the gates of the Hamilton Standard plants (F.130-137, First Trial R.201).

On June 5, 1960, at Lodge 743's last meeting before the strike, Business Representative Sullivan commented about the possibility of violence during the strike and of the state police being called when the strike started; he also told the employees that he wanted everybody at the plant at the gates, since that was his idea of a picket line (F.148-149, First Trial R.203).

3. *Commencement Of The Strike.* On May 25, 1960 both Lodges 1746 and 743 applied to the International for strike sanctions (F.152, First Trial R.204). About June 2, 1960 the International granted strike sanctions, and released them to General Vice President Coonley for release to Lodges 1746 and 743 at his discretion (F.155, First Trial R.205).

The strike at Pratt & Whitney's East Hartford and Manchester plants by Lodge 1746 began on Wednesday, June 8, 1960 about 9:00 a.m., and immediately thereafter General Vice President Coonley sent a telegram to Senior Business Representative Main retroactively releasing the strike sanction (F.162, 163, First Trial R.206).

Lodge 743's strike at Hamilton Standard's Windsor Locks and Broad Brook plants commenced at about 9:55 a.m. on June 8, 1960 (F.231, First Trial R.214).

Almost immediately after the beginning of the strike in East Hartford, District Organizer Jutras addressed about 400 members of Lodge 1746 in the union hall across the street from the plant. He told them "now it becomes our job to try to keep as many second shift employees from going into that plant as we possibly can and that can only be done by mass picketing" (F.167-168, First Trial R.206-207). At the liability trial a sound television film of Jutras' speech was shown (F.169, First Trial R.203).

Both at the liability trial and at the second damages trial were projected movie films taken by plaintiff and showing events at the gates of its East Hartford, Windsor Locks and Broad Brook plants during the period from Wednesday, June 8, 1960 through Monday, June 13, 1960 (F.170, 257, First Trial R.208, 218; A.36a, 99a). In addition there were still photographs of such activities and testimony describing those activities. The strike activities at all the plants were so similar that it was clear that both Lodges 1746 and 743 were acting in concert in their activities prior to and during the strike (F.281, First Trial R.221). During the period from June 8, 1960 through June 13, 1960, pickets by the hundreds massed shoulder to shoulder were found at every entrance. Cars trying to enter the plant were blocked by masses of pickets. Police had to employ force to attempt to open passageways for employees and vehicles entering the premises. Drivers and occupants of cars were subjected to a variety of contemptuous gestures. Employees were physically attacked. Profanities and obscenities were shouted along with threats of physical harm. Strikers ostentatiously noted license numbers and occupants of the cars entering and leaving the plant, and other strikers took pictures of the cars and occupants, all in an attempt to intimidate workers. Mirrors and radio antennas were torn off cars. Shoving, kicking, pushing and slapping of cars was commonplace. Hundreds of cars turned back. Law enforcement officers, both state and local, were shoved against and on the hoods of the cars. Traffic as a result was snarled and backed up. Numerous arrests were made. Nails, tacks and other sharp objects were strewn on the highway approaches (F.171-186, 234-256, First Trial R.208-210, 215-218). Most of the officials of the International, District 91 and the two local lodges participated in those activities (F.187-222, 258-276, First Trial R.210-213, 218-220).

4. *The Injunction Proceedings.* Shortly after the commencement of the strike, plaintiff instituted actions against the International and Lodges 743 and 1746 in the Superior Court for Hartford County, Connecticut, seeking solely injunctive relief against the mass picketing, violence, and other illegal activities occurring at the gates of its plants (F.282-283, First Trial R.221). After the actions were brought International General Counsel Papps came to Hartford to represent the defendants. He was shown movies of the mass picketing and other unlawful activities at the East Hartford plant and also saw mass picketing in person at both the East Hartford and the Hamilton Standard plants. He admitted to plaintiff's representatives that the movies would constitute strong evidence in a damage suit against the unions involved (F.286-294, First Trial R.221-223). The next morning, June 13, 1960 United Aircraft Corporation, the International, and Lodges 1746 and 743 entered into stipulations providing that the defendants would desist and refrain from mass picketing and other illegal activities at the gates of plaintiff's plants (F.295-297, First Trial R.223-226). Before the entering into of the stipulations General Counsel Papps spoke with Grand Lodge Representative Thurer, Senior Business Representative Main, Business Representatives Cope and Sullivan, and Presidents Fraser and Seedman, who opposed the stipulations because they felt they ought to be permitted to have more pickets than the stipulations permitted (F.298, First Trial R.226).

The Regional Director of the National Labor Relations Board also brought a federal court action seeking an injunction against the unlawful activities, and on June 16, 1960 the International and Lodges 1746 and 743 entered into a stipulation with respect to that action (F.301-303, First Trial R.226-229).

5. *Strike Activity After June 13, 1960.* In spite of defendants' assertions in their Petition (pp. 6-7) that

their unlawful conduct virtually ceased after the Superior Court stipulations, the facts are otherwise (F.308-309, First Trial R.230). Pickets continued to trouble employees entering and leaving the plants (F.314-315, First Trial R.231) and also truckers and contractors attempting to get into the plant (F.316-319, First Trial R.231-232). At the East Hartford plant there were 538 reports from employees of incidents involving property damage occurring while employees were going through the picket lines to enter and leave the plant or at the plant parking lots (F.310, First Trial R.230-231; F.3, Second Trial R.138). Seventy-five of the incidents occurred from June 14, 1960 through June 30, 1960, and 92 of the incidents occurred in July. A total of 171 of the incidents occurred between June 14, 1960 and the end of the strike (F.3, Second Trial R.138). At the Hamilton Standard plants between 200 and 300 reports were received from employees of incidents occurring during the strike (F.312, First Trial R.231). A very substantial majority of these incidents, which included verbal abuse and intimidation of employees, threats to employees, injury to employees, and damage to their property, occurred as they were going through the picket lines to enter and leave the plants or at the plant parking lots. About one-half were of incidents that occurred before June 14, 1960, and the other one-half were of incidents that occurred between June 14 and the end of the strike (F.4, Second Trial R.138).

6. *Settlement Of The Strike.* Negotiations to end the strike were unavailing until General Counsel Papps came to Hartford and negotiated a proposed agreement just prior to July 23 (F.378, 389, First Trial R.242-243). A meeting of Lodge 1746 was held at Bushnell Hall on July 23 to consider ratification of this contract, and, as Vice President Coonley and Grand Lodge Representative Giglio had advised Mr. Papps it would be, the meeting was riotous,

with the International, District, and local officials present doing nothing to obtain order, and in fact obviously encouraging the mob (F.390-391, First Trial R.243). The contract was rejected (F.391, First Trial R.243). However, the failure of the strike continued to become more apparent and on August 8, 1960, Lodge 743 voted to end the strike and accept the proposed contract, and Lodge 1746 did likewise the next day (F.392, First Trial R.244).

7. *Absence of Plaintiff's Employees During The Strike.* During the strike, although plaintiff continued to operate the struck plants, thousands of bargaining unit employees were absent from work on one or more days (F.227, 228, Second Trial R.177-179).

At the East Hartford plant of Pratt & Whitney, there were 266,000 bargaining unit days of absence during the strike period (F.299, Second Trial R.202). At the Windsor Locks and Broad Brook plants of Hamilton Standard, there were 91,000 bargaining unit days of absence during the strike period (F.301, Second Trial R.202).

At the second damages trial the plaintiff introduced into evidence the testimony of 181 employees of its East Hartford plant (113 as witnesses and 68 by the transcripts of their prior testimony at the first damages trial) and 27 Hamilton Standard employees (22 as witnesses and 5 by the transcripts of their prior testimony), (F.13-15, Second Trial R.140) who (with several exceptions) not only testified that they (and in some cases fellow employees) were absent from work during the strike becaues of fear or inability to get into the plants but also described in vivid detail defendants' unlawful activities at plaintiff's plants (F.20-223, Second Trial R.141-176). In addition, there was expert testimony from Professor Herbert R. Northrup of the Department of Industry of the Wharton School of Finance and Commerce of the University of Pennsylvania (F.246-247, Second Trial R.186-187) and Morgan R.

Mooney, plaintiff's retired Vice President for Industrial Relations (F.258, 264, Second Trial R.191, 192-193), explaining the effects of violence, mass picketing, and other unlawful activities at plaintiff's plant premises on employees, and giving their opinions as to what percentage of absent employees were out because of the unlawful activities at plaintiff's plant premises.

The trial court, having heard the employee witnesses and the expert testimony, having seen the movies of events at the gates of plaintiff's plants from Wednesday, June 8, 1960 through Monday, June 13, 1960, and having from the liability trial findings detailed knowledge of events that occurred before and during the strike (F.2-4, Second Trial R.137-138) found that the effects of the violence and mass picketing at plaintiff's plant premises continued up to and including July 1, 1960 (F.298, Second Trial R.202). It also found that the number of bargaining unit employee absences proximately caused by defendants' tortious acts at the East Hartford plant premises was 62,900, or 23.6% of the 266,000 total bargaining unit absences during the strike period (F.299, Second Trial R.202). It also found that the number of bargaining unit employee absences proximately caused by defendants' tortious acts at Hamilton Standard's Windsor Locks and Broad Brook plant premises was 17,600, or 19.3% of the 91,000 total bargaining unit absences during the strike period (F.301, Second Trial R.202).

8. *Strike Losses and Damages.* Because of the absence of substantial numbers of plaintiff's employees during the strike, its manufacturing costs during the strike were higher than they would have been if there had been no strike (F.326-328, 338-340, Second Trial R.206, 208-209). In addition, part of its fixed overhead expenses was wasted during the strike because those fixed expenses could not be reduced to compensate for the reduced number of employees

working (F.329-333, 341-345, Second Trial R.207, 209-210). Plaintiff's Comptroller, Charles B. Preston, provided detailed computations of such excessive costs and wasted overhead expenses (F.303-346, Second Trial R.203-210).

The Trial Court found that plaintiff's strike losses during the strike amounted to $4,149,151 at Pratt & Whitney's East Hartford and Manchester plants and $2,304,718 at the Hamilton Standard plants (F.334, 346, Second Trial R.207-208, 210). It also found that those figures did not include certain additional losses caused by the strike, such as losses in the experimental shop, which could not be measured objectively, losses by reason of the absence of indirect labor employees, and losses which continued after the strike during the remainder of 1960 and into 1961. (F.332, Second Trial R.206).

Having found plaintiff's total strike losses, the trial court proceeded to apportion the losses so as to calculate the amount resulting from defendants' unlawful activities (F.355, 356, Second Trial R.212). It did this by multiplying plaintiff's total strike losses (F.334, 346, Second Trial R.207-208, 210) by the percentages of absent employees who were absent because of the unlawful activities (F.299-302, Second Trial R.202-203). Pursuant to this calculation, it concluded that damages in the amount of $979,200 were sustained at the Pratt & Whitney Division and $444,811 at the Hamilton Standard Division, and awarded damages in such amounts together with interest from the date of judgment, September 4, 1973 (F.355, 356, 362, 363, Second Trial R.212, 213).[4]

Reasons for Denying the Petition

These actions brought by plaintiff in 1963 and consolidated in the Connecticut courts are strictly common law actions claiming damages resulting from defendants' inten-

4. Only the defendant unions, and not their members, are liable for the judgments, because only the unions are parties to the actions. Conn. Gen. Stat. §52-292.

tional torts during a strike in 1960. The petition is an obvious effort to clothe a well-settled evidential question governed by Connecticut law in federal due process and preemption garb so as to again seek review here.[5]

A. The First Claimed Question Is Not Presented.

The first claimed question is based on the same distortions of the evidence and the facts found by the trial court as appear in petitioners' Statement of the Case and History of This Litigation.

The trial court's determination of the amount of absence caused by defendants' tortious activities was not based "only" on the opinions of Mr. Mooney (A.98a-106a); it also had before it the opinions of Dr. Northrup (F.248,249, Second Trial R.187-189; A.99a-100a, 102a-105a); the testimony of 208 employees as to the effects of the unlawful acts (F.20-225, Second Trial R.141-176); findings describing and movies showing the unlawful acts (F.170-186,234-257,308-315,347-354,358-364, First Trial R.208-210,215-218,230-231, 237-240); and the number of union members, the votes rejecting plantiff's contract offers, the strike votes, the number of employees who worked each day of the strike, and the number of union members who received strike benefits (F.101,113,142,233,234, First Trial R.196,198,202; F.227,228, 233,234, Second Trial R.177-180).

Mr. Mooney was found to be an expert (F.264, Second Trial R.192-193; A.117a-119a). There was no evidence or finding of bias because he was a former "employer official."

Mr. Mooney made no "factual assumptions" and testified on the basis of his personal knowledge, not upon assumptions contained in a hypothetical question (F.264, 267, Second Trial R.192-193).

5. An earlier petition for certorari was denied, 404 U.S. 1016 (1972). So was the petition for certorari in the unsuccessful effort to enjoin the prosecution of these actions on preemption grounds. *International Assn. of Machinists* v. *United Aircraft Corp.*, 56 L.R.R.M. 2389 (D. Conn. 1964), *aff'd* 333 F.2d 367 (2d Cir. 1964), *cert. denied* 379 U.S. 946 (1964).

The connection between the facts and Mr. Mooney's opinions and his method for arriving at his opinions were explained in his testimony and described in the findings of the trial court. (F.267, 268, Second Trial R.193-194; A.104a, 121a).

Mr. Mooney's opinions were not contradicted by any facts found by the trial court, and petitioners point to none.

B. The Second Claimed Question Was Not Timely And Properly Raised Below.

Footnote 1 on page 3 of the Petition is petitioners' only attempt to comply with this Court's Rule 23.1.(f) and to show that the claimed "due process" question was timely and properly raised below. Footnote 1 makes it obvious that it was not.

Section Fourth of the trial court's Finding sets out the claims of law made by the defendants at the second damages trial; although there are 38 claims of law, none refers to due process. (Second Trial R.237-246). There is no mention of due process in the trial court's memorandum of decision (A.94a-106a).

Petitioners, apparently aware of this deficiency, point to only one clause from their 91-page brief to the Connecticut Supreme Court to support their contention that this issue was "expressly" raised below (Petition p.3,n.1.): ". . . indeed, the finding with respect to the amount of involuntary absenteeism attributable to defendants is so devoid of legitimate evidentiary support that the substantial judgment entered deprives defendants of property without due process of law." Such rhetoric, without more, is insufficient

to invoke the jurisdiction of this Court under 28 U.S.C. § 1257(3).[6]

It is obvious that the due process question was not "specially set up or claimed under the Constitution . . ." by the petitioners in the proceedings below, as required by 28 U.S.C. § 1257(3), pursuant to which this Court has stated that it will "not decide federal constitutional issues raised here for the first time on review of state court decisions." *Cardinal* v. *Louisiana,* 394 U.S. 437, 438 (1969); *Tacon* v. *Arizona,* 410 U.S. 351, 352 (1973). A review of the decision of the Supreme Court of Connecticut shows that this question was not passed on by that court, as required by the foregoing decisions. This principle is not new. *Crowell* v. *Randell,* 10 Pet. 368 (1836).

C. No Federal Question of Substance is Presented.

1. *Weighing the Evidence was the Province of the Trial Court.*

In *United Mine Workers* v. *Gibbs,* 383 U.S. 715 (1966), this Court reviewed the principles applicable to tort actions for damages caused by strike violence as follows:

> This Court has consistently recognized the right of States to deal with violence and threats of violence appearing in labor disputes, sustaining a variety of remedial measures against the contention that state law was pre-empted by the passage of federal labor legislation. *Allen-Bradley Local* v. *Wisconsin Board,*

6. *Bowe* v. *Scott,* 233 U.S. 658, 664 (1914). Also, the mere allegation of a denial of "due process of law" is insufficient to support a claim that the due process clause of the 14th Amendment has been violated. *Bowe* v. *Scott, supra* at 664; *Brady* v. *Maryland,* 373 U.S. 83, 91 (1963). This Court has also held that, where the applicable state constitution has a "due process" clause, a bare allegation of denial of due process will be deemed to relate to the state constitution and therefore is insufficient under 28 U.S.C. § 1257(3). *Bowe* v. *Scott, supra* at 664-65. The Connecticut Constitution has a due process clause. Conn. Const., Art. I, Sec. 8.

> 315 U.S. 740; *United Construction Workers* v. *Laburnum Construction Corp.,* 347 U.S. 656; *United Automobile Workers* v. *Wisconsin Board,* 351 U.S. 266; *Youngdahl* v. *Rainfair, Inc.,* 355 U.S. 131; *United Automobile Workers* v. *Russell,* 356 U.S. 634. Petitioner concedes the principle, but argues that the permissible scope of state remedies in this area is strictly confined to the direct consequences of such conduct, and does not include consequences resulting from associated peaceful picketing or other union activity. We agree. 383 U.S. at 729.

In view of the Connecticut Supreme Court's reiteration of those principles (A.68a, 81a, 82a), defendants cannot and do not contend that the Connecticut courts failed to apply them. (Petition 34). Nor do they argue that there was no evidence to support the damage awards, since their quarrel is that Mr. Mooney's opinions were adopted by the trial court. (Petition 8). Instead they argue that the trial court weighted the evidence improperly and that the Connecticut Supreme Court improperly reviewed the trial court's findings, and on that basis they invite this Court to review the entire record below and to reweigh the evidence.

But the weighing of the evidence is clearly within the province of the trial court, regardless of whether the case is considered in the preemption terms of petitioners' first question or the due process terms of the second question. As this Court said recently in *American Radio Ass'n.* v. *Mobile Steamship Ass'n.,* 419 U.S. 215 (1974):

> Petitioners' final contention is that the record fails to support the conclusion that a substantial question existed as to whether the picketing constituted "wrongful interference" under Alabama law. The question of whether evidence is sufficient to make out a cause of action created by state law and tried in the state courts is a matter for decision by those courts. Insofar as petitioners' argument on this score may be read to suggest that the evidence before

> the Alabama court would not support a finding that their activities were such as could be enjoined under *Vogt, supra,* we reject it. . . . This argument ignores the wide latitude open to triers of fact to make factual determinations on the basis of rational inferences which arise from the nature, location, and effect of picketing. 419 U.S. at 231-232.

That case involved both a preemption question and a Fourteenth Amendment claim. Even in *Milk Wagon Drivers Union* v. *Meadowmoor Dairies, Inc.,* 312 U.S. 287 (1941), a First Amendment case, this Court said:

> It is not for us to make an independent valuation of the testimony before the master. We have not only his findings but his findings authenticated by the State of Illinois speaking through her supreme court. We can reject such a determination only if we can say that it is so without warrant as to be a palpable evasion of the constitutional guarantee here invoked. The place to resolve conflicts in the testimony and in its interpretation was in the Illinois courts and not here. To substitute our judgment for that of the state court is to transcend the limits of our authority. And to do so in the name of the Fourteenth Amendment in a matter peculiarly touching the local policy of a state regarding violence tends to discredit the great immunities of the Bill of Rights. No one will doubt that Illinois can protect its storekeepers from being coerced by fear of window-smashings or burnings or bombings. And acts which in isolation are peaceful may be part of a coercive thrust when entangled with acts of violence. The picketing in this case was set in a background of violence. In such a setting it could justifiably be concluded that the momentum of fear generated by past violence would survive even though future picketing might be wholly peaceful. So the supreme court of Illinois found. We cannot say that such a finding so contradicted experience as to warrant our rejection. 312 U.S. at 294.

2. *The Connecticut Rule of Evidence Re Expert Testimony Is Not Unreasonable.*

The Connecticut Supreme Court in its second opinion (A.110a-125a) explained the Connecticut rule of evidence regarding expert testimony as follows (A.120a-121a):

> This state has long had a simple and workable standard for the admissibility of expert opinion. "The true test of the admissibility of such testimony is not whether the subject matter is common or uncommon, or whether many persons or few have some knowledge of the matter; but it is whether the witnesses offered as experts have any peculiar knowledge or experience, not common to the world, which renders their opinions founded on such knowledge or experience any aid to the court or the jury in determining the questions at issue." *Taylor* v. *Monroe,* 43 Conn. 36, 44, cited with approval *Schomer* v. *Shilepsky,* Conn. (37 Conn. L.J., No. 4, pp. 10, 12). Implicit in this standard is the requirement, later articulated, that the expert's knowledge or experience must be directly applicable to the matter in issue. *Siladi* v. *McNamara,* 164 Conn. 510, 513-14, 325 A.2d 277.

The rule in *Taylor* v. *Monroe* is quoted with approval by Wigmore in his section dealing with the test for receiving opinions of skilled witnesses. 7 Wigmore, *Evidence* (3d Ed.) 21-22. See also 31 Am Jur 2d, Expert and Opinion Evidence 744-748. Rule 702 of the Federal Rules of Evidence is similar.

3. *The Connecticut Rule Was Properly Applied.*

The trial court found that Mr. Mooney and Prof. Northrup were qualified to render opinions regarding the number of employee absences caused by the defendants' tortious acts. (F.247, 264, Second Trial R.187, 192-193). Prof. Northrup based his opinions on hypothetical questions

incorporating the facts found by the trial court and contained in the record; Mr. Mooney based his opinions on his personal knowledge of the events during the strike (F.267, Second Trial R.193). The trial court, which had before it the facts contained in the record and which had seen the movies of the violence, adopted Mr. Mooney's opinions of the number of employees absent because of the tortious acts through July 1; it found the underlying facts insufficient to prove the causation of absence after that date (F.298, Second Trial R.202; A.105a, 123-124a), and therefore did not adopt Mr. Mooney's opinions of the number of absences after July 1 caused by the tortious acts. It thus used Mr. Mooney's opinions as an "aid to the court . . . in determining the questions at issue," as provided in the Connecticut expert testimony rule.

Conclusion

The first claimed question is not presented by the record, and the second was not timely and properly raised below. Even if the questions were presented, they raise no undecided federal questions, and do not meet the criteria contained in Rule 19.1.(a) of this Court's rules. The petition should be denied so that this litigation may finally come to a conclusion.

Respectfully submitted,

S. Robert Jelley,
Counsel for Respondent.

J. Drake Turretine,
Of Counsel.

April 21, 1976

Supreme Court, U. S.
FILED
MAY 4 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1263

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS (AFL-CIO), ET AL., *Petitioners,*

v.

UNITED AIRCRAFT CORPORATION, *Respondent.*

On Petition for a Writ of Certiorari to the Supreme Court of Connecticut

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PETITIONERS' REPLY MEMORANDUM

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PETITIONERS' REPLY MEMORANDUM

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1. Respondent's claim that our first question is "not presented" is utterly fallacious.[1] We treat separately with each subpart ((a)-(c)) of that question.

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[1] Respondent also asserts: "Under Connecticut law the trial court's findings, not its memorandum of decision, are the basis of appellate review" (Opp. 3). This is refuted by what the Supreme Court of Connecticut did in this very case, where it relied on and quoted the Referee's memorandum of decision to determine

(a) Respondent asserts that the "connection between the facts and Mr. Mooney's opinions and his method for arriving at his opinions were explained in his testimony and described in the findings of the trial court" (Opp. 19). But the cited findings, set forth in full in the margin, merely recite the facts Mooney relied on and do *not* explain any "connection" between them and his opinions.[2] Nor, despite our express chal-

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his reasoning in rejecting Mooney's opinion that there was a substantial number of involuntary absences after July 1 (A. 124a). See also Maltbie, *Connecticut Appellate Practice* (1957), § 152, p. 187. Thus, this technical point, like respondent's objections to the questions presented (Opp. 18-20), is not even technically correct. The largely irrelevant "Counter Statement of the Case" (Opp. 2-17) is of a piece: All are tactics calculated to divert attention from the central issue of the case—whether Mooney's testimony provided a legally sufficient basis for distinguishing between losses caused by violence at the plant and those lawfully caused by federally privileged conduct.

[2] "267. His opinions were based upon his entire personal experience and his personal knowledge of the situation, particularly the violence, and not upon assumptions contained in a hypothetical question.

268. In arriving at his opinion, Mr. Mooney took into consideration his estimates of the number of committed strikers at the Pratt & Whitney and Hamilton Standard plants who in his opinion were committed to staying out for the duration of the strike. At Pratt & Whitney, Mr. Mooney estimated that there were 2000 to 3000 committed strikers, but to be conservative used a figure of 3500, which he considered to be reasonably related to the 3488 Lodge 1746 members who voted to strike, the average number of union members paid strike benefits, and the number of strikers who registered to return to work at the end of the strike. At Hamilton Standard, Mr. Mooney estimated that there were 1500 committed strikers, which he considered to be reasonably related to the union membership, the 1493 Lodge 743 members who voted to strike, the average number of union members paid strike benefits, and the number of strikers who registered to return to work at the end of the strike."

lenge (Pet. 37), does respondent even now suggest any rational connection between the facts relied on and the conclusion reached.

(b) The question presented asserts that the witness' method "is unknown to and unaccepted in any scientific discipline" (Pet. 3). This proposition is uncontroverted by either respondent or the record. Respondent does state that Mooney was an "expert" (Opp. 18), but it does not say expert in *what*. Our point, of course, is that Mooney's expertise in industrial relations does not qualify him to give "expert testimony" (Pet. 3) as to how many or what percentage of absentees were motivated by one reason rather than another, without even talking to any absentees, see Pet. 10-11, 40.[3]

(c) Respondent says: "Mr. Mooney's opinions were not contradicted by any facts found by the trial court, and petitioners point to none." (Opp. 19) At p. 23 of the petition we "point to" and quote the trial court's finding (A. 105a) that no employees were involuntarily absent after July 1, a finding which contradicts Mooney's opinion, detailed in the first two columns of Tables 1-A, 2-A, 3-A and 4-A to the Petition, that involuntary absences continued to the end of the strike, to which we "point" at Pet. 22-25. Contrary to respondent's misinterpretation that the trial court "found the underlying facts insufficient to prove the causation of absence after" July 1 (Opp. 24), it actually found,

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[3] As for the observation that "[t]here was no evidence or finding of bias because he was a former 'employer official' " (Opp. 18,), his former position is itself strong "evidence" of bias. The failure of the courts below to make a "finding", or even to take his bias into account, is but another of the errors of law they committed, Pet. 39-40 and authorities cited *id.*, in accepting his opinion.

on the basis of evidence [4], which Mooney and Northrup ignored or discounted, that all absences after July 1 were involuntary, because the after effects of violence had by then been dissipated. (A. 105a). Thus, the trial court rejected Mooney's evaluation of the impact of the fear dissipating events of June 11-17, n. 4, *supra*. That is the contradiction which respondent (like the court below) feels compelled to deny because it was obviously irrational for the trial court to have accepted Mooney's opinion with respect to pre-July 1 absences while rejecting his view that the after effects of violence disappeared after that date, since Mooney's pre-July 1 estimates *depended upon* his opinion that involuntary absenteeism continued to the end of the strike, and because he used the same "method" throughout (Pet. 9-10, 23-25).

Additionally, observing that the trial court "had before it the opinions of Dr. Northrup * * * "; the testimony of 208 employees and certain other facts and findings, respondent objects that its determination was not based "only" on Mooney's opinions (Opp. 18). But the trier made no independent analysis of the evidence in reaching his conclusion on the amount of absence up to July 1, much less state how any or all of it supported the result he reached; on the contrary, he rejected Northrup's sharply divergent figures and refused to draw any inference from the testimony of the 208 employees.[5] He explicitly explained the basis

[4] That evidence, set forth at A.105a, consisted of the events between June 11 and June 17: the state and federal court injunctions, "the cessation of film taking by the plaintiff of picket activity; the withdrawal of the state police" and "the widespread publicity * * * of the issuance of the injunctions" (*id.*).

[5] Respondent's reliance on that testimony is ironic, for, as we demonstrated (Pet. 20-22), it likewise *contradicts* Mooney's opinion. Respondent, like the court below, fails to respond to our demonstration of conflict.

of his finding (A. 105a): "I accept as reasonably probable the testimony of Mr. Mooney * * * " as to the percentages of involuntary absence "from June 9 up to and including July 1." [6]

2. Respondent, at Opp. 22, selects the wrong quotation from *Drivers Union* v. *Meadowmoor Co.*, 312 U.S. 287. This Court there emphasized that "it is of prime importance that no constitutional freedom," in that

[6] Respondent's objection that the second question was not timely and properly raised below (Opp. 19-20) is likewise bootless; not only was the due process claim correctly raised, it was confronted and decided by the Supreme Court of Connecticut, albeit, we submit, erroneously.

In defendants' brief on the first appeal to the Supreme Court of Connecticut we said with respect to the first trier's acceptance of Dr. Northrup's opinion (see Pet. 26-27):

> "In the final analysis, Northrup's testimony was not 'evidence' at all, and the court's reliance on it as the *sole* basis for an astronomical award for 'strike losses' was worse than a mere error of law. It constitutes a denial to defendants of due process of law, in contravention of the State and Federal Constitutions. See, *e.g.*, *Schware* v. *Bar Examiners*, 353 U.S. 232, 246-247; *Thompson* v. *Louisville*, 362 U.S. 199; *Garner* v. *Louisiana*, 368 U.S. 147." (Brief for Defendants in No. 6646, p. 88).

When the State Supreme Court held on the first appeal that the trial court was free to accept opinion testimony like that offered by Northrup, it rejected that constitutional claim, which was reiterated in the "due process" rubric on brief in the second appeal. Respondent itself points to the opinion on the first appeal to show that the Connecticut Supreme Court correctly understood the rule of *Mine Workers* v. *Gibbs*, 383 U.S. 715, on which the first question is premised (Opp. 21, citing A. 68a, 81a, 82a). Thus, the court below treated as given in its second opinion what it had previously decided (see 102a, 120a, 122a). It is absurd to suggest that the court below was unaware of our reliance upon the Fourteenth Amendment when in its second opinion it stated and rejected our position that Mooney's testimony does *not* provide the court with "any degree of assurance necessary to support the judgment of a court of law." (A. 116a.)

case the constitutional right peacefully to picket, be defeated through a state court's "insubstantial findings of fact screening reality. That is why this Court has the ultimate power to search the records in the state courts where a claim of constitutionality is effectively made." (*Id.* at 293).[7]

Respondent ignores *Letter Carriers* v. *Austin,* 418 U.S. 264, 282, which applied this tenet to rights protected by federal labor law (Pet. 34-36). Also directly in point, and likewise ignored by respondent, is *Youngdahl* v. *Rainfair,* 355 U.S. 131 (Pet. 33), where the Court examined the evidence both to determine whether it was sufficient to justify an injunction against violence (see 355 U.S. at 138-139) and whether it "entered the pre-empted domain of the National Labor Relations Board insofar as it enjoined peaceful picketing by petitioners" (*id.* at 139).[8]

A review of the record in this case compels the conclusion that the losses for which the courts below allowed recovery were not established by any competent

[7] So too, *American Radio Ass'n.* v. *Mobile Steamship Assn.,* 419 U.S. 215, 231-232 (1974), cuts against petitioner, for the portion exised from its quotation (Opp. 21-22) shows that where a claim is made that the evidence does not ground the state court's "factual determination," this Court makes an independent examination to determine whether the state court has drawn "rational inferences" from the evidence. See also *Time Inc.* v. *Firestone,* 47 L.Ed.2d 154, 167 (March 2, 1976): "There was *competent* evidence introduced to permit the jury to assess the amount of injury" (emphasis added).

[8] Mr. Justice Burton contrasted the *Meadowmoor* facts: "Nor can we say that a pattern of violence was established which would inevitably reappear in the event picketing were later resumed. * * * There is nothing in the record to indicate that an injunction against such conduct [violence] would be ineffective if picketing were resumed." (*Id.*)

or rationally probative evidence (much less by a preponderance of such evidence) to have been proximately caused by violent conduct, although in order not to penalize the federally protected right to strike "recovery may be had only for" losses proved to have been so caused (*Gibbs, supra,* at 732).[9]

3. The contention that our petition does not raise federal questions meriting review comes with exceedingly ill grace from this respondent, which represented, when this litigation was first here:

> "As for petitioners, the worst that can befall them is that they must continue to defend their strike misconduct in the state courts. If a judgment for damages is awarded against them, they can pursue their preemption contentions on appeal to the supreme court of the state and by petition for writ of certiorari before this Court. The potential injury to them in fact is far less than that to which the petitioner in *Richman* was exposed, for there this Court's affirmance of the lower court left standing an injunction issued by the state court." [10]

In the event, the injury to the unions has turned out to be far *greater* than any which could then have been expected, for the state courts have rendered an enor-

[9] Since federal rights are at stake, this case is not "governed by Connecticut law" (Opp. 18, cf. *id.* 23-24). In any event, our quarrel is not with the rule of *Taylor* v. *Monroe,* 43 Conn. 36, 44, as quoted at Opp. 23, but with its application to Mooney, who did *not* "have any peculiar knowledge or experience, * * * which renders [his] opinions founded on such knowledge or experience any aid to the court * * * in determining the questions at issue." See p. 3 *supra* and Pet. 8-25, and 36-40.

[10] Brief for Respondent United Aircraft Corp. in Opposition, No. 533, Oct. Term 1964, p. 14.

mous judgment for respondent's strike losses, differentiating those which were tortiously caused from those caused by federally protected activity only by scuttling "the essential requirement * * * that mere speculation be not allowed to do duty for probative facts" *Galloway* v. *United States,* 319 U.S. 372, 395. Respondent is unsurprisingly impatient to collect that judgment without subjecting it to the scrutiny of that tribunal whose foremost function is the vindication of federal rights. But lest those rights be sacrificed on the altar of irrational "expert" inference, this case must "be allowed to run its course, including the ultimate reviewing power in this Court." *Clothing Workers* v. *Richman Bros.,* 348 U.S. at 521.

CONCLUSION

For the reasons stated herein and in the petition, the Petition for Certiorari should be granted.

Respectfully submitted,

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